No. 87-1061

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

JERRY TARKANIAN,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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APPENDIX

DOCUMENT A

SUPREME COURT OF THE UNITED STATES

No. A-395

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Applicant,

v.

JERRY TARKANIAN

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 25, 1987.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 21st day of November, 1987.

DOCUMENT B

(Filed August 27, 1987)

IN THE
SUPREME COURT OF THE STATE OF NEVADA

No. 16256

JERRY TARKANIAN, UNIVERSITY OF NEVADA, LAS VEGAS; DR. LEONARD GOODALL, as President of the University of Nevada, Las Vegas and Officer of the University of Nevada; FRANKIE SUE DEL PAPA, LILLY FONG, DOROTHY GALLAGHER, CHRIS KARAMANOS, JOAN DENNEY, DANIEL J. KLAICH, JOHN McBRIDE, JOANN SHEERIN and JUNE WHITELY as Members of the Board of Regents of the University of Nevada,
Appellants and Cross-Respondents.

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Respondent and Cross-Appellant.

Appeal from injunction prohibiting suspension of Jerry Tarkanian as UNLV Basketball Coach; cross-appeal from denial of attorney's fees as damages; appeal from order granting attorney's fees as costs pursuant to 42 U.S.C. § 1988. Eighth Judicial District Court, Clark County; Paul S. Goldman, District Judge.

Reversed in part, affirmed in part, remanded.

OPINION

PER CURIAM:

This is the second appeal in litigation involving Jerry Tarkanian's suspension as head basketball coach at the University of Nevada-Las Vegas (UNLV). The trial court granted Tarkanian injunctive relief because of the NCAA's failure to comply with due process standards. The trial court also awarded Tarkanian attorney's fees pursuant to 42 U.S.C. § 1988. We affirm in most respects, reversing and remanding only for recomputation of attorney's fees.

THE FACTS

The NCAA is a private, voluntary association consisting of approximately 960 public and private educational institutions. The NCAA Council, which is elected at annual conventions, is responsible for implementation and interpretation of NCAA policies. The NCAA Committee on Infractions administers the NCAA enforcement program.

UNLV is a public university existing by virtue of Article 11, Section 4 of the Nevada Constitution. Jerry Tarkanian has been a head basketball coach for nearly thirty years, at UNLV since 1973.

After a two and one-half year investigation of UNLV's basketball program, the Committee on Infractions issued to UNLV an Official Inquiry on February 25, 1976. The Official Inquiry was fifty-four pages in length and outlined seventy-two rule violations which allegedly occurred between 1970 and 1976. The Official Inquiry was later supplemented with six additional allegations. UNLV was requested to conduct its own investigation and respond

by June 1, 1976. The Nevada State Attorney General's Office conducted an extensive investigation of the allegations. The individuals named in the Official Inquiry were located, and attorney general personnel either traveled to their homes or flew them to Las Vegas for interviews.

UNLV submitted to the Committee on Infractions a response consisting of a restatement of each allegation and an explanation whether UNLV agreed that a violation occurred. UNLV also submitted two boxes of sworn statements, affidavits and other documentary evidence supporting denials of rule violations.

The Committee on Infractions considered the allegations in hearings covering approximately a three-day period. The NCAA enforcement staff's evidence consisted of the investigators' oral recollections of interviews with sources. The investigators relied on memoranda of the interviews, sometimes dictated after the interviews. The interviewees did not check the accuracy of the memoranda. With respect to the allegations against Tarkanian, UNLV affidavits and sworn statements directly controverted the testimony of the NCAA enforcement staff.

Of the seventy-eight allegations, the Committee found thirty-eight violations of NCAA rules. Tarkanian was named in ten of the violations. The Committee issued its findings in Confidential Report No. 123(47), which directed UNLV to show cause why additional penalties should not be imposed against it if it did not suspend Tarkanian from involvement with the University's Intercollegiate Athletic Program for two years.

UNLV appealed certain findings and penalties to the NCAA Council in May, 1977, including all involving

Tarkanian. The Council affirmed the findings and penalties of the Committee on August 23, 1977. In September, 1977, UNLV conducted a hearing to determine whether to follow the NCAA's directive. The hearing officer questioned the factual basis of the charges against Tarkanian, but felt UNLV had no choice but to accept the penalties in the Confidential Report. UNLV's President accepted the hearing officer's recommendation and suspended Tarkanian.

Tarkanian brought suit against UNLV in September, 1977 and obtained injunctive relief. This court reversed for failure to join a necessary party, the NCAA. University of Nevada v. Tarkanian, 95 Nev. 389, 594 P.2d 1159 (1979). Tarkanian commenced a second suit in July, 979, against both UNLV and the NCAA. The trial court granted Tarkanian injunctive relief but denied Tarkanian's claim for attorney's fees as damages under state law. The trial court, however, did allow attorney's fees as costs pursuant to 42 U.S.C. § 1988.

DISCUSSION

State Action.

The NCAA first contends that UNLV's and the NCAA's imposition of penalties against Tarkanian does not constitute state action.

Due process restrictions apply only to activities which can be characterized as state action.[1] Early cases held that NCAA regulatory activity constituted state action.

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1. The "under color of law" requirement of 42 U.S.C. § 1983 is identical to the state action requirement of the Fourteenth Amendment. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982). The parties use both terms, but for convenience' sake, we will refer only to state action.

See, e.g., Regents of the Univ. of Minn. v. N.C.A.A., 560 F.2d 352 (8th Cir. 1977), *cert. denied*, 434 U.S. 978 (1977); Howard University v. N.C.A.A., 510 F.2d 213 (D.C. Cir. 1975); Parish v. N.C.A.A., 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. v. N.C.A.A., 493 F.2d 1251 (9th Cir. 1974). The rationale underlying these cases was that many NCAA member institutions were either public or government supported. Rivas Tenorio v. Liga Atletica Interuniversitaria, 554 F.2d 492, 495 (1st Cir. 1977). However, the NCAA argues that a trilogy of 1982 Supreme Court decisions and cases subsequently interpreting them require a different result. We disagree.

The Supreme Court cases on which the NCAA relies are Rendell-Baker v. Kohn, 457 U.S. 830 (1982), Lugar v. Edmondson Oil Company, Inc., 457 U.S. 922 (1982), and Blum v. Yaretsky, 457 U.S. 991 (1982).

In *Blum*, medicaid patients in private nursing homes challenged the decision of physicians to transfer them to lower levels of care without notice or a hearing. 457 U.S. at 1006. The Court held that due process limitations did not apply because government regulations did not dictate the decision to transfer. Rather, private physicians determined whether the patient's care was medically necessary based upon professional standards. *Id.* at 1006-08. The Court stated that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* at 1004. The Court further noted that mere regulation, subsidization, or acquiescence in the initiatives of a private party do not create state action. *Id.*

In *Rendell-Baker*, the Court relied upon similar reasoning to hold that a private high school for maladjusted students did not act under color of law when it discharged teachers. The Court reached this conclusion even though the school was governmentally regulated and received most of its students by referral from public schools, and public funds had accounted for over ninety percent of its budget. 457 U.S. at 832-33.

In *Lugar*, the Court determined that a private party's joint participation with state officials in the seizure of disputed property constituted action under color of state law. The Court interpreted its cases to require "that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." 457 U.S. at 937. This inquiry contains a two-part approach:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937.

Cases subsequent to *Blum*, *Rendell-Baker*, and *Lugar* have rejected the earlier line of cases which held that NCAA regulatory activity is state action. In Arlosoroff v. N.C.A.A., 746 F.2d 1019 (4th Cir. 1984), a Duke University tennis player challenged NCAA eligibility requirements. In holding that the state action requirement was

not met, the court said that it could not be shown that state schools joined as a bloc to cause the bylaw in question to be adopted. Thus the coercive power test explained in *Blum* was not met, and the court found no state action. 746 F.2d at 1022. *Arlosoroff* specifically rejected the earlier line of cases which held that NCAA regulatory activity is state action. *Id.* at 1021. *See also* Graham v. N.C.A.A., 804 F.2d 953 (6th Cir. 1986); Ponce v. Basketball Federation, 760 F.2d 375 (1st Cir. 1985); McHale v. Cornell Univ., 620 F. Supp. 67 (N.D.N.Y. 1985).

The *Blum* trilogy and cases subsequently interpreting it do not require the result which the N.C.A.A. urges. Both *Blum* and *Rendell-Baker* recognized that state action may be present "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the state.'" *Blum,* 457 U.S. at 1005 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. at 345, 353 (1974)); *see also Rendell-Baker,* 457 U.S. at 842. UNLV is a public institution, existing by virtue of Article 11, section 4 of the Nevada Constitution. Tarkanian is therefore a public employee. In our view, the right to discipline public employees is traditionally the exclusive prerogative of the state. UNLV cannot escape responsibilty for disciplinary action against employees by delegating that duty to a private entity.

The *Arlosoroff* court held that the regulation of intercollegiate athletics is not a function traditionally exclusively reserved to the state. *See also Rendell-Baker,* 457 U.S. at 842 (while education is a public function, it has not been traditionally the exclusive function of the state). However, the facts of the instant case are distinguishable from *Arlosoroff* and other cases cited by the NCAA in that those cases concerned private schools. *See Arlosoroff,* 746

F.2d 1019 (applicability of NCAA eligibility requirements to Duke University tennis player); *McHale,* 620 F. Supp. 67 (applicability of NCAA eligibility requirements to Cornell University student). Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953 (6th Cir. 1986), on which the NCAA relies in its supplemental points and authorities, is also distinguishable. *Graham* did not deal with the enforcement of NCAA rules against a state employee, as in the instant case.

For similar reasons, the two-part approach articulated in *Lugar* requires that we conclude state action is present. The first prong is met because no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university. Thus, the deprivation which Tarkanian alleges is caused by the exercise of a right or privilege created by the state. Also, in the instant case, both UNLV and the NCAA must be considered state actors. By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA.

Property or Liberty Interest.

The protections of due process attach only to deprivations of property or liberty interests. Sullivan v. Brown, 544 F.2d 279, 282 (6th Cir. 1976). The NCAA argues that Tarkanian did not possess a constitutionally protected property or liberty interest. We disagree.

In Board of Regents v. Roth, 408 U.S. 564, 577 (1972), the Supreme Court stated that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure

certain benefits and that support claims of entitlement to those benefits." A contract for employment can be the basis of a property right. Stewart v. Bailey, 556 F.2d 281, 285 (5th Cir. 1977).

In our view, Tarkanian's contractual relationship with UNLV establishes a property interest in continued employment. Since July, 1973, Tarkanian had been employed under a series of one-year contracts running from July through June. His 1977-1978 contract was entitled "Tenured Professional Employment Document." This contract, which was dated June 20, 1977 and was for a term running from July 1, 1977 through June of 1978, was a continuation of an established practice between the parties. The contract granted Tarkanian tenure, thus confirming his testimony that upon arrival at UNLV he was promised tenure would be given at some time in the future. This contract was in force when UNLV suspended Tarkanian in September, 1977.

The NCAA argues that Tarkanian was not deprived of a property interest because the suspension affected only his duties as head coach. According to his 1977-1978 contract, Tarkanian held the positions of both head basketball coach and professor of physical education. Case law supports that employees do not have a property interest in a particular position. *See e.g.*, Childers v. Independent School Dist. No. 1, 676 F.2d 1338, 1341 (10th Cir. 1982); Sullivan v. Brown, 544 F.2d 279, 282 (6th Cir. 1976). Given the facts of this case, this argument is not persuasive. Tarkanian had been a head basketball coach for twenty-eight years, four at UNLV. Continued employment only as a professor of physical education would be a drastic change from his previous assignment.

We also believe that Tarkanian possessed a liberty interest protected by the due process clause. The Supreme Court defined the parameters of the due process liberty interest in *Paul v. Davis*, 424 U.S. 693, *reh'g denied*, 425 U.S. 985 (1976). In *Davis*, the Court held that in order to invoke the protections of the due process liberty interest, a plaintiff must show that a "right or status previously recognized by state law was distinctly altered or extinguished" and that his reputation was injured as a result. *Id.* at 711. This test has become known as the "stigma-plus" test, the stigma being an injury to reputation, the plus being a change in a previously recognized status. The NCAA is unpersuasive in contending that Tarkanian fails both prongs of the test.

The stigma which satisfies the "stigma-plus" test in the employment context must be such that it forecloses plaintiff's opportunity to take advantage of other employment opportunities. Altman v. Hurst, 734 F.2d 1240, 1243 (7th Cir. 1984), *cert. denied*, 469 U.S. 982 (1984); Bollow v. Federal Reserve Bank, 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982). Dismissal from employment on grounds involving immorality or dishonesty satisfies the stigma prong of the stigma-plus test. Lawson v. Sheriff, 725 F.2d 1136, 1139 (7th Cir. 1984). The grounds for suspending Tarkanian satisfy this standard.[2]

---

2. The NCAA's findings against Tarkanian included that (1) he arranged for a student to get a "B" grade without attending class or doing class work; (2) he attempted to impede the NCAA's investigation by discouraging individuals from providing information and encouraging individuals to provide false information; (3) he provided free airline transportation to a student-athlete; (4) he reimbursed an individual's expenses for recruiting a student-athlete; (5) he falsely certified UNLV's program as in compliance with NCAA rules; and (6) his conduct did not comport with high ethical standards.

The NCAA also contends that Tarkanian has not suffered a sufficient change of status. As already noted, however, even though Tarkanian would have retained employment as a professor, the NCAA's disciplinary action would have drastically altered his position. *Cf.* Hardiman v. Jefferson County Bd. of Educ., 709 F.2d 635 (11th Cir. 1983) (one week suspension without pay insufficient to invoke due process protections); Mosrie v. Barry, 718 F.2d 1151 (D.C. Cir. 1983) (lateral transfer to less desirable district insufficient to invoke due process protections). Absent judicial intervention, Tarkanian's suspension might well have ended his college coaching career.

Due Process.

The NCAA contends that the trial court erred in finding that the manner in which Tarkanian was suspended did not afford due process of law. We disagree.

In the hearings before the Committee on Infractions, the NCAA enforcement staff presented orally the NCAA's case. The investigators' presentation consisted of their recollections of interviews with sources. The investigators relied upon notes of the interviews, sometimes dictated after the fact. Tarkanian and UNLV hotly contested virtually all of the testimony which allegedly established rule violations by Tarkanian, and they presented evidence directly contradicting the investigators' testimony, generally consisting of signed affidavits and statements from persons whom the NCAA had interviewed. In the circumstances of this case, this procedure does not comport with due process requirements.

Procedural due process requirements are flexible and vary as the particular situation demands. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). In *Mathews*, the Court

held that three competing interests should be balanced in determining what process is due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

A case on point is Stanley v. Big Eight Conference, 463 F. Supp. 920 (W.D. Mo. 1978). In *Stanley*, the plaintiff sought to enjoin the Big Eight Conference, working in cooperation with the NCAA, from conducting a hearing to determine if Oklahoma State University athletic personnel had violated rules of the Conference and the NCAA. The court granted injunctive relief.

In *Stanley*, the court noted the severe impact on coaching personnel when they are found to have violated the rules governing their activities. *Id.* at 926-27, 930. We have already discussed this point in the context of Tarkanian's liberty or property interest and will not repeat it here. We only reiterate our view that Tarkanian's suspension likely would have ended his near thirty-year career as a head coach and permanently tarnished his reputation. He no doubt possessed a significant interest in the outcome of the NCAA proceedings, an interest which cannot be taken lightly.

We next consider the nature of the fact-finding procedures employed by the NCAA. In *Stanley*, the fact-

finding body intended to rely upon as evidence of wrongdoing an investigator's eighteen page report detailing interviews with approximately seventy-five people. *Id.* at 924. The court held the procedures to be unconstitutional, stating:

> Of greatest concern to the Court is that the author of the investigative report is free to draw certain inferences beyond those statements of fact made to him in his interviews.
>
> . . . .
>
> . . . Furthermore, the author of the report presents statements made to him in a fashion that may not necessarily be prejudicial or biased but may certainly be classified as not completely neutral. It is this unconscious subjective coloring of the statements that troubles the Court. Accurate findings of fact should not be made upon pre-digested information.

Id. at 931.

There are significant similarities between this case and *Stanley*, and we are persuaded by *Stanley's* reasoning. *Stanley* involved a substantial investigation, with seventy-five people interviewed. The NCAA's investigation of Tarkanian and UNLV spanned approximately a two and one-half year period and resulted in fifty-eight pages of typed material detailing seventy-eight allegations of infractions. Also, in *Stanley*, the plaintiff denied the allegations pertaining to him. In the instant case, Tarkanian not only denied the allegations, he produced numerous sworn statements directly contradicting the testimony of the NCAA's investigators. In these circumstances, basing findings of fact upon pre-digested information creates serious due process problems. The lengthy

and far-reaching scope of the NCAA's investigation in this case creates the danger that the enforcement staff may not remember the precise nature of interviews. This increases the likelihood that investigators, no matter how pure their intentions, will gloss their testimony with an "unconscious subjective coloring." Also, despite the NCAA's desire to make the investigation a cooperative effort, the proceedings obviously became adversarial. Again, this enhances the likelihood that pre-digested information will be presented in a fashion favorable to the investigator-witness's position. As the court noted in *Stanley*, "[f]ew investigative reports can be written in a totally objective manner void of the author's subjective attitudes." *Id.* at 931 n.4.

Alternative procedures for protecting Tarkanian's interest are available. At a minimum the NCAA should be required to produce written affidavits of persons interviewed by the enforcement staff. This would attenuate the problem of a "subjective coloring" of the facts.

Attorney's fees.

The NCAA next argues that the trial court erred in awarding attorney's fees pursuant to 42 U.S.C. § 1988 (1982). Section 1988 allows the court in its discretion to award a party prevailing in a 42 U.S.C. § 1983 (1982) action a reasonable attorney's fee as a part of the costs. The NCAA argues that Tarkanian pleaded only in his complaint violations of the Fourteenth Amendment, without mentioning § 1983, and therefore cannot recover attorney's fees pursuant to § 1988. We disagree.

A cause of action under § 1983 requires an allegation that someone deprived the plaintiff of a federal right under color of state law. Gomez v. Toledo, 446 U.S. 635, 638

(1980). Tarkanian's complaint met these criteria, even though his complaint did not mention § 1983. This is a sufficient basis for obtaining attorney's fees. *See* Kirchberg v. Feenstra, 708 F.2d 991, 1000 (5th Cir. 1983); Harradine v. Board of Supervisors, 425 N.Y.S.2d 182, 188 (App. Div. 1980) (plaintiff may recover attorney's fees pursuant to § 1988 in a state court action which does not allege violation of § 1983, but seeks to enforce federal rights).

The NCAA also contends that the trial court erred by awarding attorney's fees for claims upon which Tarkanian did not prevail. Tarkanian's complaint sought redress for violation of both First and Fourteenth Amendment rights. Because the trial court made findings only on violation of Tarkanian's Fourteenth Amendment rights, the NCAA argues that he did not prevail on his First Amendment claim and the attorney's fees award should be reduced proportionately. We disagree. Tarkanian's claims for relief are not so easily separated. Both involve a common core of facts and are based on closely related legal theories. Moreover, Tarkanian obtained all the relief he hoped to obtain. *See* Hensley v. Eckerhart, 461 U.S. 424, 440 (1983) ("Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.").

The NCAA next asserts that the trial court erred by awarding attorney's fees for a phase of the litigation in which Tarkanian did not prevail. We agree. Tarkanian initially sued only UNLV. On appeal, this court reversed Tarkanian's favorable judgment for failure to join a necessary party, the NCAA. University of Nevada v. Tarkanian, 95 Nev. 389, 594 P.2d 1159 (1979). Nonetheless

the trial court award attorney's fees against the NCAA in favor of Tarkanian for fees expended during the first trial.

Section 1988 allows recovery of fees only to a prevailing party. In our view, the first trial is a distinct phase of this litigation in which Tarkanian did not prevail. *See* Doulin v. White, 549 F. Supp. 152 (E.D. Ark. 1982). The district court erred in awarding fees to Tarkanian for that phase of this litigation. On remand, the trial court shall reduce attorney's fees accordingly.

The trial court also awarded Tarkanian an additional $5,000.00 in fees that was not supported by the billing records submitted. Because there was no evidence to support this amount, it shall likewise be eliminated.

Tarkanian submitted detailed records to establish attorney's fees, and except as noted, the trial court did not abuse its discretion in fixing the amount of fees awarded. Because some attorney's fees were appropriate pursuant to § 1988, it is unnecessary to consider Tarkanian's cross-appeal for fees as damages under state law.

Testimony of Charles Alan Wright.

The NCAA contends on appeal that the trial court erred in refusing to grant a continuance in order to allow Charles Alan Wright to testify. The NCAA also asserts that the trial court should have admitted a transcript of Mr. Wright's prior testimony before a congressional sub-committee. Mr. Wright is a noted law professor and was a member of the Committee on Infractions. The NCAA argues that the trial court's failure to allow his testimony warrants reversal. We reject the NCAA's argument. Three members of the Committee on Infractions

testified at trial, two of whom were law professors. In these circumstances, even if the trial court did err, we fail to see how the NCAA was prejudiced.

The Trial Court Injunction.

Finally the NCAA argues that the trial court's order granting injunctive relief is overly broad. We agree that the order does contain some confusing language. We are certain, however, that the trial court intended only to prohibit enforcement of the penalties imposed upon Tarkanian in Confidential Report No. 123(47) and UNLV's adoption of those penalties. To the extent the trial court's order may be given a broader interpretation, we modify its meaning to comport with this intention.

We have considered the NCAA's remaining contentions and conclude they lack merit.

/s/ Gunderson, C.J.
Gunderson
/s/ Steffen, J.
Steffen
/s/ Young, J.
Young
/s/ Springer, J.
Springer
/s/ Mowbray, J.
Mowbray

DOCUMENT C

(Filed June 25, 1984)

CASE NO. A173498
DEPARTMENT NO. X
CIVIL DOCKET K

IN THE
EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA; UNIVERSITY OF NEVADA, LAS VEGAS; DR. LEONARD GOODALL, as President of the University of Nevada, Las Vegas, and Officer of the University of Nevada; and FRANKIE SUE DEL PAPA, LILLY FONG, DOROTHY GALLAGHER, CHRIS KARAMANOS, JOAN KENNEY, DANIEL J. KLAICH, JOHN McBRIDE, JOANN SHERRIN and JUNE WHITE[illegible], as Members of the Board of Regents of the University of Nevada; and the NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association,
Defendants.

PRELIMINARY STATEMENT, FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION, ORDER AND JUDGMENT

PRELIMINARY STATEMENT

The Plaintiff (hereinafter "Tarkanian") filed this suit on September 8, 1977, against the University of Ne-

vada, Las Vegas (hereinafter "UNLV"), the then-President of that University, and the then-Members of the Board of Regents of that University, seeking, *inter alia*, to enjoin the enforcement of a sanction required of UNLV by the National Collegiate Athletic Association (hereinafter "NCAA").

On October 12, 1977, based upon a "STIPULATION OF FACTS" and brief testimony by the Plaintiff and four (4) other persons, Tarkanian successfully enjoined UNLV from carrying out the NCAA-mandated sanction, which sanction required of UNLV, the "complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period [two years] of the University's probation, including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups and public relations or fund-raising activities related to the University's athletic program." The University appealed.

On May 17, 1979, then-Chief Justice Mowbray of the Nevada Supreme Court reversed and remanded the matter for joinder of the NCAA in compliance with the Nevada Rules of Civil Procedure, Rule 19 (a), and to "serve the interest of judicial efficiency by precluding subsequent litigation. . . ." The NCAA had appeared as "amicus curiae" before the Supreme Court of the State of Nevada; the other four members of that Court had concurred with the Chief Justices's opinion and action.

Tarkanian filed a "SECOND AMENDED AND SUPPLEMENTAL COMPLAINT" on July 23, 1979; UNLV filed its "ANSWER TO SECOND AMENDED AND SUPPLEMENTAL COMPLAINT" on March 28, 1980; and

NCAA filed its "DEFENDANT NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ANSWER TO PLAINTIFF'S SECOND AMENDED AND SUPPLEMENTAL COMMPLAINT [sic]" on August 10, 1983. Numerous pretrial matters and disputes had to be resolved before the second trial could proceed, including NCAA's oral motion for a continuance.

The parties stipulated that the provisions of Rule 41(e) of the Nevada Rules of Civil Procedure were waived on May 11, 1982.

Trial of this present litigation commenced on June 11, 1984, and was concluded on June 22, 1984. What follows then, arises out of, and is the result of, this last (and hopefully final) trial.

FINDINGS OF FACT

1. The Plaintiff is a tenured professor at UNLV at an annual salary of $53,000.00 (approximate).

2. The Plaintiff is also the Head Basketball Coach at UNLV, for which he is annually paid (in lieu of his salary as a professor) $125,000, plus 10% of the net proceeds received by UNLV for participation in NCAA-authorized championship games, plus fees from basketball camps and clinics, product endorsements, and income realized from writing a newspaper column, speaking on a radio program entitled "THE JERRY TARKANIAN SHOW," and appearing on a television program bearing the same name.

3. The various sources of the Plaintiff's income as described in paragraph 2 of these FINDINGS OF FACT are entirely contingent on the Plaintiff's continued status as the Head Basketball Coach at UNLV.

4. The Plaintiff received approximately $1,600.00 for basketball clinics and camps and product endorsements during Calendar Year 1983, in addition to his $125,000 salary; no evidence was offered as to the exact amount of any other possible sources of income; the Plaintiff is "compensated" for his participation in the newspaper column, the radio talk show and the television show.

5. The Plaintiff has been a basketball coach for twenty-eight (28) consecutive years, and is the "winningest" active basketball coach at the present time.

6. The Defendant UNLV is a legal and corporate entity organized and existing under and by virtue of, Article II, Section 4 of the Constitution of the State of Nevada and the laws of the State of Nevada; this Defendant is a public institution of higher education, financed by the State of Nevada.

7. The Defendant UNLV has been engaged in fielding a major basketball team, within (and without) the membership of the NCAA; UNLV is, and has been, a member of NCAA.

8. The current President of UNLV and the current members of the Board of Regents, named as defendants in this action, appear *pro forma,* and are deemed to be represented by counsel for UNLV, and to have interests and contentions identical to those of UNLV.

9. Defendant NCAA is a "voluntary" association of some 1,000 institutions of higher education which "consent" to being bound by its constitution, by-laws and other so-called "legislation" (rules). [At the time of the acts of which Plaintiff complains, the NCAA's membership totalled approximately 850 members.]

10. At all times material to this action, the Defendant NCAA was, and is, predominant in the field of intercollegiate athletics, *e.g.,* NCAA does virtually all of the negotiating for its members with regard to television coverage, and supervises the payment to the membership of the many millions of dollars garnered from such coverage(s). In the words of the Chairman of the NCAA Committee (at the time the penalty against UNLV was imposed), "The NCAA is the only game in town."

11. NCAA "legislation" (rules) is set forth in an annual publication (hereinafter "The Manual"); references to "the Manual" will hereinafter refer to the 1976-1977 publication, unless specifically noted as being otherwise.

12. For some considerable period of time before February 26, 1976, NCAA conducted a preliminary investigation of UNLV and Tarkanian, vis-a-vis the Manual's requirements. ("Manual," in this context, refers to NCAA legislation dating back to at least as early as 1973.)

13. For the last twenty-four (24) months of this investigation, it was participated in, and supervised by, one Samuel David Berst, a then-Field Investigator for NCAA.

14. At all times material to this action, the same Samuel David Berst entertained actual bias and prejudice against the Plaintiff.

15. The same Samuel David Berst sought and obtained authority from the NCAA's Committee on Infractions to charge UNLV with violating NCAA legislation, *i.e.,* an "Official Inquiry."

16. This same Samuel David Berst inspired, authored and drafted this Official Inquiry, in whole or in part.

17. On February 26, 1976, NCAA submitted this Official Inquiry to UNLV, which required UNLV to answer numerous questions, perhaps as many as 300, on or before June 1, 1976.

18. UNLV obtained an extension of time to so respond of 120 days.

19. On June 21, 1976, NCAA submitted a "Supplemental Official Inquiry" to UNLV, with more questions; this was also inspired, authored and drafted - in whole or in part - by the same Samuel David Berst.

20. The State of Nevada provided UNLV with the services of two lawyers from the Office of the Attorney General of the State of Nevada and UNLV also obtained the services of a lawyer engaged in the private practice of law, to assist in the formulation of UNLV's response to both inquiries from NCAA.

21. Despite numerous requests - written and oral - counsel for UNLV - and private counsel for the Plaintiff - were unable to obtain from NCAA (or any other persons) any information about the practices and procedures of the Committee on Infractions, before whom UNLV and the Plaintiff would have to appear to present responses.

22. These requests for information included, *inter alia*: (1) whether the proceedings would be reported (transcribed); (2) whether the sources of the NCAA's information would be provided to UNLV before any hearing; and generally rules regarding these possibly adversarial hearings, *e.g.*, who had the burden of proof and what that burden would be.

23. The policies and procedures of the Committee on Infractions, unbeknownst to UNLV or to the Plaintiff,

were not codified, but scattered throughout the minutes of the Committee in other infraction hearings involving other schools.

24. The minutes of the Committee were drafted - in whole or in part - by NCAA employees in the Enforcement Division, including the same Samuel David Berst.

25. The stated purpose of the NCAA's inquiries was to ensure that there would be two, independent investigations of the charges against UNLV and its basketball program.

26. UNLV (and the Plaintiff) were obliged by NCAA to provide the Enforcement Division's investigators the results of their investigation, despite the fact that the NCAA would not reciprocate.

27. There were three (3) adversarial hearings before the NCAA Committee on Infractions, viz: November 14, 1976; December 13 and 14, 1976; and March 13, 1977; the NCAA "could not afford" to bring before it any of the persons whose information formed the bases of the charges.

28. The Plaintiff was neither accompanied by, nor represented by, counsel at the first hearing, having been misled as to that right by NCAA.

29. The first two hearings conducted before the Committee on Infractions consisted of a comparison of the unsworn recollections of the NCAA investigators with the UNLV - and Plaintiff - supplied affidavits of persons who had been interviewed by Samuel David Berst (and others) of the NCAA.

30. The third hearing was conducted at the request of UNLV and the Plaintiff, to look into the integrity and

truthfulness of the NCAA investigators, in view of the diametrically-opposed recollections and affidavits.

31. In the event of a dispute, such as occurred in all three hearings, the members of the NCAA Committee on Infractions invariably and automatically found the recollections of their investigators to be accurate and truthful, and found the information disputing those recollections to be inaccurate and untruthful.

32. There were no standards or guidelines for the members of the Committee to use, *e.g.*, the burden of proof was variously considered by members to be a preponderance, proof beyond a reasonable doubt, or being "absolutely sure" of the truthfulness of the allegations resulting in "Findings," *i.e.*, findings that UNLV was guilty of the infractions claimed by NCAA investigators.

33. At least one member of the five-member Committee on Infractions had made up his mind against UNLV before any hearings took place.

34. On April 26, 1977, the NCAA Committee on Infractions issued its "Confidential Report," enumerating its numerous findings of UNLV infractions.

35. The "Confidential Report" set forth an order to UNLV to show cause why additional penalties should not be imposed on UNLV if it did not effect "complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period [two (2) years] of the University's probation including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups and public relations or fund-raising activities related to the University's athletic program."

36. On May 13, 1977 - consistent with the Manual - UNLV gave written notice of appeal of the findings and penalty of the Committee on Infractions to the NCAA Council.

37. Plaintiff and UNLV appeared before the Council for the administrative appeal; an "Expanded Confidential Report" consisting of the earlier "Confidential Report" and the University's response was presented to the Council.

38. The same Samuel David Berst inspired, authored and drafted - in whole or in part - this "Expanded Confidential Report."

39. The members of the Council (as was the case with members of the Committee) never disagreed with the "facts" given them by NCAA investigators, but sometimes disagreed to the extent that these "facts" did not amount to a violation of NCAA legislation.

40. After UNLV, the Plaintiff and their respective counsel had left the Council hearing, the Council invited the NCAA investigators to again appear, all without notice to UNLV or to the Plaintiff, to help "clarify" certain issues.

41. On August 25, 1977, NCAA notified UNLV of the Council's acceptance of the Committee on Infraction's numerous findings and its penalty.

42. On August 26, 1977, the NCAA issued a press release which included a summary of those findings and the penalty imposed.

43. On August 30, 1977, UNLV gave notice to Plaintiff of an administrative hearing to be held by UNLV to inquire into the necessity of complying with the NCAA - imposed penalty.

44. On September 6, 1977, this hearing was had before a hearing officer who believed that UNLV had three (3) choices, viz: (1) withdrawing from the NCAA or (2) severing Tarkanian from UNLV as dictated by the NCAA; contesting the NCAA's findings did not appear to be a viable third alternative to this hearing officer.

45. On September 7, 1977, Defendant UNLV gave written notice to the Plaintiff that UNLV was going to comply with the NCAA-dictated penalty, and further, that the severance would become effective on September 9, 1977.

46. Although the Court could *sua sponte* take judicial notice of the fact that the Plaintiff was represented by counsel at the second and third hearings before the Committee on Infractions, before the NCAA Council, before the trial court which initially heard the litigation between the Plaintiff and UNLV, and who represented the Plaintiff before the Supreme Court of the State of Nevada, and before this Court in the instant action, the sole mentions of attorneys' fees are in paragraph XXVI and in the prayer for relief in the "SECOND AMENDED AND SUPPLEMENTAL COMPLAINT;" further, not a single question was asked of any witness as to the extent or cost of attorney representation.

47. "THE SECOND AMENDED AND SUPPLEMENTAL COMPLAINT" seeks redress for the threatened deprivation of "property and liberty without procedural or substantive due process. . . ."

48. The Plaintiff did not seek redress against the Defendants, or any of them, on a theory of a wilful tort, *e.g.*, defamation or interference with the Plaintiff's contractual rights, except obliquely; no proof of damages, except as herein noted, was offered.

CONCLUSIONS OF LAW

1. The actions of the NCAA were (and are) "state action," for constitutional and jurisdictional purposes. *Justice v. NCAA*, 577 F.Supp. 356 (D. Ariz. 1983), *Associated Students, Inc. v. NCAA*, 493 F.2d 1251 (9th Cir. 1974).

2. Defendant NCAA's reliance on *Blum v. Yaretsky*, 102 S.Ct. 2777 (1982) is misplaced. Defendant UNLV is a public institution, and is State-funded.

3. Defendant UNLV's reliance on *Adams v. A.Q.H.A.*, 583 S.W. 2d 828 (Tex. Civ. App. 1979) is misplaced. Defendant NCAA did not, and has not, "heeded the bounds of reason, common sense and fairness and do not violate public policy or the law." Further, membership in the NCAA could hardly be called "voluntary." (See Paragraph 9, *supra.*)

4. Both the Defendant NCAA and the Defendant UNLV have deprived the Plaintiff Tarkanian of procedural due process, *i.e.*, the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 96 S.Ct. 893 (1976).

5. Both the Defendant NCAA and the Defendant UNLV have deprived the Plaintiff Tarkanian of substantive due process, *i.e.*, the guarantee that he will not be deprived of liberty or property for arbitrary reasons. *Allen v. State of Nev., Pub. Emp. Ret. Bd.*, 100 Nev. Adv. Op., No. 20 (1984); the decision by NCAA was arbitrary and capricious, and the decision of UNLV was vicariously so. *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1 (7th Cir. 1974).

6. Immediate and irreparable harm that would come to the Plaintiff includes not only damage to his reputa-

tion, but also from a loss of income which is his due, and not a mere unilateral expectation of that income. *Paul v. Davis*. 96 S.Ct. 1155 (1976).

7. The immediate and irreparable harm with which the Plaintiff is threatened by the currently-enjoined acts of the Defendant NCAA and Defendant UNLV is the loss of both liberty and property interests which must be safeguarded. *Board of Regents of State Colleges v. Roth*, 92 S.Ct. 2701 (1972).

8. Membership in the NCAA bears a likeness to prohibited "adhesion contracts," *i.e.*, the three (3) factors of (1) substantive unfairness; (2) the relationship of NCAA and UNLV; and (3) the disparity of their respective bargaining powers seem to be present. *Bill Stremmel Motors v. IDS Leasing Corp.*, 89 Nev. 414, 514 P.2d 654 (1973); Annot. 86 A.L.R.3d 862, Annot. 18 A.L.R.3d 1305.

9. Plaintiff Tarkanian has no adequate remedy at law, inasmuch as the stigma attached to Plaintiff's name would be ineradicable.

10. Balancing the interests of Tarkanian, UNLV and the NCAA, one need look no further than the great span of time which has elapsed between the final decision of the NCAA (and the capitulation of UNLV) and the time that this trial commenced (and ended), without a single complaint about the delay from either the NCAA or UNLV.

11. Attorneys' fees must be not only alleged, as in this case, but proved as well; therefore, no attorneys' fees may be awarded.

OPINION

This case presents a classic example of how misperception becomes suspicion, which in turn becomes hostility, which leads, inevitably, to a deprivation of one's rights. The Court speaks, of course, about how the view of Las Vegas, Nevada from Shawnee Mission, Kansas seems to have affected the earlier (and current) proceedings in this long-standing dispute.

The National Collegiate Athletic Association (NCAA) has evolved from the small, loose-knit association of schools envisioned by President Theodore Roosevelt in 1906 to a large bureaucracy with not only a permanent staff, but it also exercises a pervasive force throughout its 1,000-member association. In short, NCAA now seems to say: "If you want to play ball, you must join us, obey our rules and surrender *any* claim you may have under the Bill of Rights." This Court disagrees with that attitude, as any fair-minded person must.

University of Nevada, Las Vegas, (UNLV) carried out the real aim of the NCAA (severing Tarkanian), not out of respect for the NCAA's "Findings," but due to fear of the seemingly omnipotent Enforcement Division of NCAA. Despite the fact that the then-President of UNLV found that the "factual basis for the NCAA's charges and sanctions as they apply to Coach Tarkanian is clearly in doubt," UNLV felt that it was on the horns of a dilemma, *i.e.*, yield to the unjust actions of the NCAA or face being relegated to the position of a pariah in that association or to withdraw from the NCAA altogether.

The Official Procedure Governing the NCAA Enforcement Program (the Manual, at p. 116) provides, in pertinent part:

> Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics are, in the final analysis, teachers of young people. Their responsibility is an affirmative one and they must do more than avoid improper conduct or questionable acts. Their own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example. Much more is expected of them than of the less critically placed citizen.

It would seem that these fine sentiments should also apply to the "critically placed" investigators - and others - of the NCAA. Regrettably, both the full-time investigators and part-time Committee and Council members acted and thought not like Caesar's wife, but rather as arrogant lords of the manor. The language, apparently subscribed to by all of these NCAA personnel, to illustrate this arrogance, may be found in the Manual at page 118, the last sentence of Section 5 (urged on this Court by one of NCAA's many lawyers):

> Determinations of fact and violations arrived at in the foregoing manner by the Committee, or by the Council on appeal, shall be final, binding and conclusive, and shall not be subject to further review by the Council *or any other authority.* (Emphasis supplied.)

The members of the Committee on Infractions and the Council relied on the "integrity" of the permanent NCAA staff (including NCAA's investigators) and never accorded representatives of its members the common courtesy (and legal necessity) of providing a neutral

forum in which disputes regarding allegations of violations of NCAA "legislation" (rules) could be resolved. Even the NCAA's insistence on the use of the word "legislation," instead of, *e.g.*, "rules," gives us a glimpse of NCAA's view of itself and of its power.

At least one of NCAA's investigators (or employee of the Enforcement Division) inspired, authored and drafted - in whole or in part - the NCAA preliminary investigation; the authority to issue an inquiry to UNLV; the Official Inquiry; the minutes of the Committee on Infractions wherein the Committee's rules (*now* codified in the 1984-1985 Manual) appeared; the Confidential Report of that Committee; the Findings and penalty imposed by that Committee; the Expanded Confidential Report (with the Enforcement Division's comments) used by the Council on appeal; and the order of the Council and the widely-promulgated press release about the supposed violations of NCAA "legislation." These personnel also matched their unsworn and unwritten recollections against the sworn, written statements, of the same persons, offered by both Tarkanian and UNLV. These NCAA practices might be considered "efficient," but so was Adolf Eichmann and so is the Ayatollah.

A case in point will serve to illustrate the prejudice a Member (in this case, UNLV, of course) faces when challenged by the NCAA staff: NCAA investigators alleged (and "found") that Coach Tarkanian had, in violation of NCAA legislation, paid the air fare of one "Jeep" Kelly from his home to Las Vegas, Nevada. (Kelly was a player being recruited by Tarkanian.) Despite the facts that UNLV produced an affidavit from Kelly's high school coach, stating that *he* had paid for the ticket; UNLV and

Tarkanian produced a copy of the ticket; and the high school coach's cancelled check which showed the payment, the NCAA found Tarkanian "guilty" of this alleged infraction.

Not only were Tarkanian and UNLV set off on wild-goose chases because of NCAA's refusal to let them know what the rules of the hearings would be, but when Tarkanian or a representative of UNLV would telephone NCAA for some guidance, those telephone calls would be secretly taped, as that was NCAA "policy." Not only is such interception a felony in Nevada, and at least a Class A misdemeanor in Kansas, it also illustrates the duplicity of the permanent staff of NCAA. After all, just in 1984, a person in a position of trust in the Reagan Administration was found to be "unethical" for such practice, even though it may not have been illegal.

Three (3) members of the five-person Committee on Infractions testified, revealing, *inter alia*, the three (3) versions of the burden of proof set out in Finding of Fact No. 32, and the Chairman of the NCAA Council also testified and revealed, for the first time, that the fifteen (15)-member Council had delegated its determination to a committee of three (3) of its number. Neither Tarkanian nor UNLV was aware of this before Professor J. Neils Thompson testified. (Professor Thompson is a Professor of Civil Engineering at the University of Texas [since 1942]; he was also the chairman of the Council.)

The three Committee on Infractions' members who testified were: HARRY M. CROSS, a Professor of Law at the University of Washington (since 1943); WILLIAM A. MATTHEWS, Professor of Law at the University of Kentucky; ARTHUR R. REYNOLDS, a "Compliance Officer" with the GREELEY (Colo.) NATIONAL BANK (and the then-chairman of the Committee).

Some mention must be made about the treatment the judicial system has received from the NCAA:

ITEM: At the same time that the NCAA was hiding behind the conditional immunity afforded "voluntary" associations, the NCAA appeared as "amicus curiae" ("friend of the Court") in the lawsuit between Tarkanian and UNLV, before the Nevada Supreme Court.

ITEM: Notwithstanding the fact that the myriad number of NCAA lawyers were given notice that they had to abide by the practices and procedures of this Court and were on notice as to what those written, published practices and procedures are, they sought to get a continuance of the trial in a manner violative of those rules.

ITEM: Notwithstanding the fact that the NCAA expressed a desire, through counsel, to "amicably" resolve the dispute, counsel called as witnesses some persons whose testimony counsel himself doubted.

ITEM: The NCAA, incredibly, sought to equate "time" with "due process." The reasoning of the NCAA was, apparently, that since the Committee's and the Council's presentations and deliberations were time-consuming, Tarkanian and UNLV were afforded due process.

ITEM: Notwithstanding the fact that this Court admonished the NCAA for issuing daily press releases during the two-week trial, the NCAA chose to make a further release *after* it had been admonished not to try its case in the media.

In sum, what started out as an association whose members met and exceeded certain lofty goals, ended up as

the NCAA-bureaucracy which looks upon its friends (sycophants) with feigned pleasure, and its enemies (those who still recognize the U.S. Constitution) with barely-concealed malevolence. The NCAA has numerous, very distinguished individuals on its various committees and its Council for public consumption, but the real power is in the hands of bureaucrats who are unknown to, and unelected by, the membership of the NCAA.

The NCAA is an association which exists for the purpose of seeing that there is fair play; it also has the obligation to play fairly.

ORDER AND JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the University of Nevada, Las Vegas, its President, Dr. Leonard Goodall and the members of the Board of Regents, Frankie Sue Del Papa, Lilly Fong, Dorothy Gallagher, Chris Karamanos, Joan Kenney, Daniel J. Klaich, John McBride, Joann Sherrin and June Whitely, and any persons or entity acting in concert or participation with these named defendants is restrained and enjoined from effectuating any mandate of the National Collegiate Athletic Association, *i.e.*, the severance (complete or otherwise) of any and all relations [Plaintiff] Tarkanian may have, formally or informally, with the University's intercollegiate program . . . including, but not limited to, activities associated with the administration, supervision, coaching, recruiting, athletic booster groups, and public relations or fund-raising activities related to the University's athletic program.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant University and its President

and the members of its Board of Regents and any persons or entities, its officers agents, servants, employees and attorneys acting in concert are further restrained and enjoined from enforcing any provisions of Confidential Report No. 123 (47) [Case No. 443, University of Nevada, Las Vegas]);

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant National Collegiate Athletic Association and any persons or entities, its officers, agents, servants, employees and attorneys acting in concert are restrained and enjoined from any further proceedings against the University of Nevada, Las Vegas, and more particularly, requiring that the University show cause why it should not carry out the mandate of the defendant, National Collegiate Athletic Association;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the National Collegiate Athletic Association and any persons or entities, its officers, agents, servants, employees and attorneys acting in concert are restrained and enjoined from compelling the University to comply with the terms of Confidential Report No. 123 (47) [Case No. 443, University of Nevada, Las Vegas]);

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the National Collegiate Athletic Association and any persons or entities, its officers, agents, servants, employees and attorneys acting in concert should take no action with regard to the University of Nevada, Las Vegas with regard to this Confidential Report;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the injunctions herein-above imposed upon the defendants, and each of them, and any persons or entities or their respective officers, agents, servants, em-

ployees and attorneys acting in concert with them, is made permanent.

DATED AND DONE THIS 25th day of June, 1984.

/s/ Paul S. Goldman
Paul S. Goldman
District Judge

DOCUMENT D

(Filed January 21, 1985)

CASE NO. A 173498
DEPT. NO. X
CIVIL DOCKET K

IN THE
EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA, UNIVERSITY OF NEVADA, LAS VEGAS, DR. LEONARD GOODALL, as President of the University of Nevada, Las Vegas, and Officer of the University of Nevada; and FRANKIE SUE DEL PAPA, LILLY FONG, DOROTHY GALLAGHER, CHRIS KARAMANOS, JOAN KENNEY, DANIEL J. KLAICH, JOHN McBRIDE, JOANN SHERRIN and JUNE WHITELY, as Members of the Board of Regents of the University of Nevada; and the NATIONAL COLLEGIATE ATHLETIC ASSOCIATION an unincorporated association,
Defendants.

NOTICE OF ENTRY OF ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO: Defendant NCAA, and DAVID GOLDWATER, ESQ., its Attorney; and

TO: Defendants UNIVERSITY OF NEVADA, *et al.*; and to GARY GOODHEART, ESQ., Attorney for all Defendants Except NCAA:

PLEASE TAKE NOTICE that the Court's FINDINGS OF FACT AND CONCLUSIONS OF LAW and ORDER were entered on the 21st day of January, 1985, in the above-entitled action, true and correct copies of which are attached hereto.

Lionel Sawyer & Collins
By: /s/ Mark A. Solomon
Samuel S. Lionel, Esq.
Mark A. Solomon, Esq.
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff, Jerry Tarkanian, Head Basketball Coach for the University of Nevada, Las Vegas commenced this action on September 8, 1977 against The University of Nevada, The University of Nevada, Las Vegas, the then President of University of Nevada, Las Vegas and an Officer of the University of Nevada, and members of the Board of Regents of the University of Nevada seeking to vindicate his civil rights by enjoining those defendants from carrying out the National Collegiate Athletic Association's mandate to suspend plaintiff from his coaching position at University of Nevada, Las Vegas for a period of two years.

2. The first trial of this action commenced on October 12, 1977 and culminated with plaintiff Tarkanian obtaining a permanent injunction prohibiting those defendants from suspending plaintiff from his coaching position.

3. After the Nevada Supreme Court reversed and remanded the matter for joinder of the NCAA as a party-defendant, plaintiff filed a Second Amended And Supplemental Complaint on July 23, 1979 alleging facts sufficient to state a claim for relief under 42 U.S.C. §1983. At all times since September 8, 1977 all defendants knew that plaintiff commenced this action under 42 U.S.C. §1983.

4. After numerous pretrial matters and disputes were resolved, including the NCAA's oral motion for a continuance, the second trial of this matter commenced on June 11, 1984 after the then current President of the University of Nevada, Las Vegas and Members of the Board of Regents of the University of Nevada were substituted as defendants for their respective predecessors. Hereinafter all defendants other than the NCAA shall be collectively referred to as "UNLV".

5. On June 25, 1984 the Court entered its Preliminary Statement, Findings Of Fact, Conclusions Of Law, Opinion, Order And Judgment ("Ruling") and held that the action of defendants NCAA and UNLV constituted state action and deprived plaintiff Tarkanian of his rights to procedural and substantive due process under the United States Constitution. The Court issued a permanent injunction prohibiting defendants from carrying out the NCAA's mandate to suspend plaintiff from his coaching position at UNLV.

6. In its Ruling, the Court also denied plaintiff attorney's fees as damages.

7. On June 26, 1984 plaintiff filed a Memorandum of Costs And Disbursements ("Cost Memorandum").

8. Both the affidavit of plaintiff's counsel, Mark A. Solomon of Lionel Sawyer & Collins, and the detailed attorney time records appended to plaintiff's Cost Memorandum demonstrated that through June 22, 1984 plaintiff incurred $168,364.70 in attorney's fees and $2,814.22 in costs in connection with this litigation.

9. On June 29, 1984, defendant UNLV filed a Motion To Retax And Settle Costs; and on that same date, defendant NCAA also filed a Motion To Retax And Settle Costs.

10. On July 17, 1984, the date set for hearing of defendants' motions to retax and settle costs, defendant NCAA filed a Petition For Removal to the United States District Court, District of Nevada.

11. On November 15, 1984 the United States District Court, District of Nevada remanded this case to this Court.

12. On December 4, 1984 the Court heard oral argument on defendants' motions to retax and settle costs and ordered further briefing.

13. On January 11, 1985 plaintiff filed Supplemental Points And Authorities In Opposition To Motion To Retax And Settle Costs ("Supplemental Opposition") in which he requested an additional $19,773.00 in attorney's fees for services performed from June 23, 1984 through January 10, 1985. Plaintiff attached thereto detailed attorney time records covering that period and substantiating the services performed and fees charged.

14. Also attached to plaintiff's Supplemental Opposition is an affidavit by the Legal Administrator of

Lionel Sawyer & Collins, Mary Ann Kennington, which states the results of a June, 1984 survey conducted by the then President of the Las Vegas Chapter of the Association of Legal Administrators on prevailing market rates for attorney services in Las Vegas, Nevada.

15. With the exception of a conclusionary affidavit without foundation submitted by the NCAA's counsel, David Goldwater, to the effect that the fees sought by Lionel Sawyer & Collins exceeded prevailing market rates, neither the NCAA nor UNLV presented any evidence challenging the accuracy or reasonableness of the hours and rates charged and services provided by plaintiff's counsel as detailed in the attorney time records submitted to the Court on June 26, 1984 and January 11, 1985.

16. The Court is well familiar with counsel for plaintiff, their work product and preparation during the course of this litigation, and the rates charged for similar services by attorneys and paralegals of comparable experience, reputation and skill in Las Vegas, Nevada.

17. The Court has read the entire file in this action and observed plaintiff's counsel during all pretrial, trial and post-trial matters before this Court and believes that the quality of services rendered by plaintiff's counsel met the standards of professional excellence.

18. This case presented complicated and novel issues of fact and law, particularly civil rights law, and plaintiff obtained virtually all the relief requested in his Second Amended And Supplemental Complaint.

19. Defendant NCAA initiated and controlled the proceedings which led to plaintiff Tarkanian's suspension. In suspending plaintiff from his coaching position, UNLV

was in large part responding to the mandate of the NCAA which has been intimately involved in this action from its inception.

20. If any of these findings of fact are more properly conclusions of law, they shall be so deemed.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter by virtue of the United States District Court's remand of this action on November 15, 1984.

2. Plaintiff is a prevailing party under 42 U.S.C. §1983 and is entitled to an award of costs and attorney's fees pursuant to N.R.S. 18.005 et seq. and 42 U.S.C. §1988.

3. Plaintiff has presented the Court with clear and convincing evidence regarding the services performed, the rates charged and the hours worked by his counsel on this litigation.

4. The services performed, hours worked and rates charged by plaintiff's counsel as detailed in the attorney time summaries submitted to the Court on June 26, 1984 and January 11, 1985 are reasonable.

5. Pursuant to the evidence presented by plaintiff and the Court's own experience, the Court is satisfied that the rates charged by plaintiff's counsel are reasonable and in line with the rates charged in Las Vegas, Nevada, for similar services by attorneys and paralegals of comparable skill, experience and reputation.

6. Pursuant to N.R.S. 18.005 et seq. and 42 U.S.C. §1988 plaintiff Tarkanian is entitled to an award of costs including attorney's fees in the amount of $195,951.92.

7. The award of costs and attorney's fees shall be apportioned among the defendants as follows: (1) defendant NCAA shall be assessed and shall pay to plaintiff 90% of the award, and (2) defendant UNLV shall be assessed and shall pay to plaintiff 10% of the award.

8. If any of these conclusions of law are more properly findings of fact, they shall be so deemed.

DATED this 21 day of January, 1985.

/s/ Paul S. Goldman
District Judge

SUBMITTED BY:

Lionel Sawyer & Collins
By: /s/ Mark A. Solomon
Samuel S. Lionel, Esq.
Mark A. Solomon, Esq.
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

ORDER

This matter came before the Court for hearing pursuant to defendant National Collegiate Athletic Association's (hereinafter "NCAA") Motion To Retax And Settle Costs filed June 29, 1984 and defendants University of Nevada, et al.'s (hereinafter collectively "UNLV") Motion To Retax And Settle Costs filed June 29, 1984, Lionel Sawyer & Collins representing plaintiff Tarkanian, Jones, Jones, Bell, Close & Brown representing defendants UNLV, and David Goldwater, Ltd. and Swanson Midgley, Gangwere, Clarke & Kitchin representing defendant NCAA,

and the Court having considered all moving and opposition papers, and the Court having made its Findings Of Fact And Conclusions Of Law, hereby makes its orders as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT defendants' motions to retax and settle costs be, and the same are hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to N.R.S. 18.005 et seq. and 42 U.S.C. §1988 plaintiff is awarded the amount of $195,951.92 as costs including attorney's fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the award of costs including attorney's fees shall be apportioned among defendants as follows: (1) defendant NCAA shall be assessed and shall pay to plaintiff the amount of $176,356.73, which is equal to 90% of the award; and (2) defendant UNLV shall be assessed and shall pay to plaintiff the amount of $19,595.19, which is equal to 10% of the award.

DATED this 21st day of Jan., 1985.

/s/ Paul S. Goldman
District Judge

SUBMITTED BY:
Lionel Sawyer & Collins
By: /s/ Mark A. Solomon
Samuel S. Lionel, Esq.
Mark A. Solomon, Esq.
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

RECEIPT OF COPY

RECEIPT OF COPY of the above NOTICE OF ENTRY OF ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW is hereby acknowledged this 21st day of January, 1985.

David Goldwater, Esq.
By: /s/ David Goldwater
David Goldwater, Esq.
302 E. Carson, #1000
Las Vegas, Nevada 89101
Attorneys for Defendant NCAA

DATED this 21 day of January, 1985.

Jones, Jones, Close & Brown
Chartered
By: /s/ Gary R. Goodheart
Gary R. Goodheart, Esq.
300 South Fourth Street, #700
Las Vegas, Nevada 89101
Attorneys for all Defendants
Except NCAA

DOCUMENT E

UNIVERSITY OF NEVADA, University of Nevada, Las Vegas, Donald H. Baepler, as President of the University of Nevada, Las Vegas, and an Officer of the University of Nevada, and James Buchanan, II, Dr. Fred Anderson, John Buchanan, Lilly Fong, Chris Karamanos, Molly Knudtsen, Dr. Louis Lombardi, Brenda Mason, John Tom Ross, as Members of the Board of Regents of the University of Nevada,
Appellants,

v.

Jerry TARKANIAN,
Respondent.

No. 10425.

Supreme Court of Nevada.

May 17, 1979.

OPINION

MOWBRAY, Chief Justice:

The respondent, Jerry Tarkanian, commenced this action in the district court seeking declaratory and injunctive relief from a severance order barring Tarkanian from association with the athletic program of the University of Nevada, Las Vegas (UNLV).

UNLV, its president and regents have appealed. The National Collegiate Athletic Association (NCAA), whose report of Tarkanian's activities was the predicate for UNLV's order of suspension, is not a party to this action. The NCAA has filed an amicus curiae brief with this court.

THE BACKGROUND OF THE LITIGATION

UNLV is a public institution of higher learning which is financed by the State of Nevada. It is a member of the NCAA, an unincorporated association of approximately 830 members, including virtually all four year colleges and universities in the United States with major intercollegiate athletic programs. As a member of the NCAA, UNLV contractually agrees to administer its athletic program in accordance with NCAA legislation. The NCAA Constitution provides that "Legislation governing the conduct of intercollegiate athletic programs of member institutions shall apply to basic athletic issues such as admissions, financial aid, eligibility and recruiting; member institutions shall be obligated to apply and enforce this legislation, and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation." Primary responsibility for administering the NCAA enforcement program has been delegated to the Committee on Infractions.

On February 26, 1976, the NCAA Committee on Infractions initiated enforcement proceedings involving UNLV by submitting an Official Inquiry to its president, respondent Dr. Baepler. The Official Inquiry was the result of a preliminary investigation conducted over a period of approximately three years by the NCAA investigative staff. The Official Inquiry included, *inter alia*, allegations that Tarkanian had violated NCAA legislation. Upon receipt of the letter of inquiry, UNLV enlisted the aid of the Attorney General of the State of Nevada to conduct a "cooperative investigation".

Hearings before the Committee on Infractions were conducted on November 14, 1976; December 13, and 14, 1976; and March 13, 1977. The record contains the follow-

ing description of the nature of these proceedings by an NCAA official:

> Once the institution has collected all available information, it then meets with the Committee on Infractions to discuss the information which it has obtained and previously submitted to the Committee in writing. The purpose of this hearing before the Committee on Infractions is for both the institution and the NCAA investigative staff, for the first time, to present specific information to the Committee concerning alleged violations of NCAA legislation. This procedure provides an adequate opportunity for the institutional representatives to debate any of the information presented to the Committee by the investigative staff or the institution, and to be advised of the source of the information upon which each allegation is based. Both the Committee on Infractions and the University will be informed at the hearing of the identity of the source of evidence upon which an allegation is based as well as any actual details or evidence reported by individuals interviewed.

The requests of UNLV for prior disclosure of the factual bases or sources of the allegations contained in the letter of inquiry had been denied. Shortly before the first hearing was scheduled, the NCAA notified the university that it had changed its prior position and would allow counsel representing university employees named in the allegations to be present. Tarkanian was present at all of the hearings and was represented by counsel at the second and third. According to the record herein, "the charges and allegations against Jerry Tarkanian were presented by the sole means of having either of two NCAA

staff investigators . . . orally relate what each of them recalled of conversations he purportedly had with certain individuals concerning their knowledge of purported violations of NCAA legislation by Jerry Tarkanian." The sources of the information reported to the investigators were not present to give testimony or be cross-examined. A tape recording of the proceedings was made by the NCAA, but no other reporting was allowed, and the tape was not made available for later transcription by the NCAA, although university attorneys were allowed to travel to Kansas City to listen to it.

On April 26, 1977, the Committee on Infractions issued Confidential Report No. 123(47) containing the Committee's findings of violations of NCAA legislation and recommending penalties to be imposed on UNLV for such violations. Among the Committee's findings was a charge that Tarkanian had either contacted or arranged for others to contact principals involved in the infractions investigation in an effort to discourage them from reporting violations to the NCAA or to cause them to give untruthful information to the university's investigators. Included in the penalty section was an order directing UNLV to show cause why additional penalties should not be imposed if it did not take disciplinary action with regard to "Head Basketball Coach Jerry Tarkanian which, in the Committee's present view, should be complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period of the University's probation including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups and public relations or fundraising activities related to the University's athletic program."

The university's attention was drawn to the "responsibilities of the institution" under NCAA legislation "to provide due notice and hearing to the involved individual before taking any disciplinary or corrective action."

UNLV appealed the findings and penalty provisions of the report to the NCAA Council. In its written memorandum the university contested the factual bases for twenty-seven of the Committee's findings, including some twenty which directly or indirectly involved Tarkanian, contending that evidence obtained in its own investigation demonstrated that no violations had occurred. The university was critical of the procedures employed by the NCAA, and attacked the credibility of the two NCAA investigators who had presented information to the Committee on Infractions. Tarkanian and the university were allowed twenty and thirty minutes, respectively, for oral presentation of information to the Council. On August 25, 1977, the NCAA Council accepted the findings and recommended penalty of the Committee on Infractions.

On September 6, 1977, pursuant to notice, Tarkanian was given a hearing before a hearing officer appointed by the university. Tarkanian was advised that the charges were as specified in the NCAA Confidential Report, that he could have assistance of counsel, that he could call witnesses in his behalf, and that he could have a transcript of the hearing made. Though the evidence before the NCAA was discussed, no witnesses were presented. Counsel for Tarkanian took the position that the university's own evidence established that no violations had occurred, while counsel for the university argued that the university was bound by the findings of the NCAA. In a written decision, the hearing officer concluded that counsel for the university was correct in his argument that "by joining the NCAA we delegated to that organization the establishment of governing standards and their enforcement as well. We are allowed and encouraged to make our own investigations, but this is in no way a substitute for the investigative functions of the NCAA itself. . . . We must accept their findings of fact as in some way superior to our own." He also found that "in this instance the NCAA's standards of proof and due process were inferior to what we might reasonably expect. . . ." He recommended executing the proposed NCAA sanctions. Dr. Baepler notified Tarkanian the following day that he had decided to follow the hearing officer's recommendation, effective September 9, 1977, noting "the University is simply left without alternatives."

THE PRESENT LITIGATION

On September 8, 1977, Tarkanian filed suit against UNLV, President Baepler, and the university's regents, seeking an injunction restraining enforcement of the NCAA sanction by the university, and a declaration that he had been denied procedural and substantive due process of law. A major portion of the complaint was directed to the procedures, findings and penalty of the NCAA. By its answer, the university put Tarkanian's allegation concerning the NCAA's activities and procedures at issue. The university also alleged, as an affirmative defense, that it was "a mere extension of the NCAA and, therefore, plaintiff has been afforded not only the due process hearing provided by the University of Nevada, Las Vegas, but also prior hearings conducted by the NCAA, all in compliance with the traditional notions of due process of law."

Prior to trial, an extensive "Stipulation of Facts" was filed by the parties. Some 30 of the 37 stipulations

concerned the structure and procedures of the NCAA in general, or its actions in this case in particular. Accompanying the stipulated facts were ten exhibits, including correspondence between the university's investigator and the NCAA staff regarding problems encountered by the university related to NCAA procedures.

At trial, Tarkanian and two other witnesses testified as to the effect of a suspension upon Tarkanian's reputation and career. Tarkanian also called the two attorney-investigators for the university, who detailed their problems with NCAA staff and procedure. The only witness questioned as to the evidence for the underlying charges against Tarkanian was the deputy attorney general who had acted for the university during its investigation; he testified that he had found no factual basis for the charges. No witnesses were presented for the defense.

AN ACTUAL CONTROVERSY IS PRESENTED

As a threshold issue, amicus curiae suggests that the case should be dismissed as not presenting an actual controversy. As this court has recognized, " 'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' " *State v. Teeter*, 65 Nev. 584, 654, 200 P.2d 657, 691 (1948). The principle requires that a court "act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976).

Accord, National Collegiate Athletic Ass'n v. Califano, 444 F.Supp. 425 (D.Kan.1978). In *State v. McCullough*, 20 Nev. 154, 156, 18 P. 756 (1888), the court observed that "Courts uniformly refuse to consider cases brought upon pretended controversies, when the object of the suit is to get the opinion of the court for the benefit of the parties themselves, or to affect the interest of third persons."

In the instant case, it is clear that the purpose of the university's suspension of Tarkanian was to carry out the mandate of the NCAA, and not merely to create a cause of action for litigation. There is no evidence whatever to suggest that had the university prevailed it would then have reinstated Tarkanian, in defiance of what it had determined were its contractual obligations to the NCAA and in the face of prospective sanctions by the NCAA.

This case does present an actual controversy, and therefore shall not be dismissed.

THE JOINDER OF THE NCAA AS A NECESSARY PARTY

Rule 19 of the Nevada Rules of Civil Procedure provides for the joinder of persons needed for just adjudication. It provides:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action *shall be joined* as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to pro-

tect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. *If he has not been so joined, the court shall order that he be made a party.* If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

(Emphasis added.)

This provision of the rules of civil procedure reflects certain long-standing policies prevailing in equitable actions, such as the one now before the court, as described in *Robinson v. Kind*, 23 Nev. 330, 47 P. 1, 47 P. 977 (1896). In such cases, all persons with an interest in the subject matter of the suit are to be made parties " 'so that there may be a complete decree which shall bind them all.' " 23 Nev. at 335, 47 P. at 2. If the interest of the absent parties " 'may be affected or bound by the decree, they must be brought before the court, or it will not proceed to a decree.' " *Id.* If a defendant before the court may be subjected to future litigation, or danger of loss, under the decree, the absent person must be made a party. *Id.* at 335-36, 47 P. 1.

As is shown by the mandatory language of Rule 19(a), the enforcement of the rule is not left to the parties themselves. As was said of the prior statute dealing with equitable actions,

> "If there are other persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, then the statute is peremptory. The court must cause such persons to be brought in. It is not a matter of discretion, but of absolute judicial duty. The enforcement of this duty does not rest entirely upon the the parties to the record. If they should neglect to raise the question and to apply for the proper order, the court, upon its own motion, will supply the omission, and will either directly bring in the new parties, or remand the cause in order that the plaintiff may bring them in."

Robinson v. Kind, 23 Nev. at 338, 47 P. at 3-4. Thus the question of waiver is not appropriate to the determination of this issue, and the trial court or the appellate court may raise the issue *sua sponte*. *Johnson v. Johnson*, 93 Nev. 655, 572 P.2d 925 (1977). This is sound policy, for the rule thus protects the interest of the courts themselves in the efficacy and integrity of their own proceedings, as well as the interests of the parties.

In the case at hand, it is clear from the pleadings, the evidence presented at trial, and the judgment, that the NCAA should have been joined in this action. First, the interest of the NCAA in the subject matter of this litigation was such that either the university would be affected, or the NCAA's ability to protect its interests would be impaired, and in either case further litigation of the controversy would be likely, should it proceed without joinder of the NCAA.

As the situation now stands, regardless of the outcome of this litigation, the NCAA may claim a contractual right to bind the university to enforce the NCAA's decision by sanctions it deems appropriate. This is illustrated in the factual background of *Regents of University of Minnesota v. National Collegiate Athletic Association*, 560 F.2d 352 (8th Cir.), *cert. dismissed* 434 U.S. 978, 98

S.Ct. 600, 54 L.Ed.2d 472 (1977), in which the university sought injunctive relief against NCAA sanctions. In that case, the university had been enjoined by a state court from declaring certain students ineligible, pursuant to an NCAA determination, without a prior university hearing comporting with due process. As a result of such hearings, the university refused to suspend the students. The NCAA then placed the university on indefinite suspension, including a ban on post-season play or television appearances for all sports, until the university complied with its directive to declare the students ineligible. The NCAA took the position that it could not "permit an individual institution to retain either interpretive or enforcement authority" over NCAA legislation. *Id.* at 360.[1]

Respondent argues that the court need not be concerned with the university's position on this account, since the university will be insulated by the terms of the lower court's decree from compliance with the NCAA decision. If the university would be so protected, the NCAA would, to that extent, be unable to protect its interests in its enforcement proceedings. *See Ky. H. S. Athl. Ass'n v. Hopkins Cty. Bd. of Ed.*, 552 S.W.2d 685 (Ky.App.1977).

An independent ground for requiring joinder in this case is provided by the directive of Rule 19(a) that a person be joined when "complete relief" cannot be accorded the parties before the court in his absence. A major objective of this provision is "to have a final and

1. The NCAA's right to impose those sanctions upon the university was upheld by the Court of Appeals, on the ground that the court order, and due process, were complied with when the university hearings were held, affording procedural due process, and determining that the underlying facts found by the NCAA were essentially correct.

complete determination of the controversy, not to determine issues piecemeal . . . ." *Investment Co. v. Reno Club,* 66 Nev. 216, 222, 208 P.2d 297, 300 (1949). In this case, the controversy presented involves the NCAA directly, and cannot be completely and justly determined in its absence. The NCAA initiated and controlled the proceedings against UNLV which led to Tarkanian's suspension. The NCAA made the factual findings upon which Tarkanian's suspension was based. To consider the case as if it involved solely the relationship of the university and Tarkanian, or began with the university's notification to Tarkanian of its intent to hold a hearing regarding his proposed suspension, would require the plaintiff to forego constitutional claims to which he may well be entitled.

Plaintiff's fundamental claim in this case is that he was denied his constitutional right to due process of law. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)." *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). It is clear that the meaningful factual determinations in this case, as well as the decision as to the penalty to be imposed, had been made by the NCAA *before* Tarkanian was afforded a hearing by UNLV. A court of equity, in particular, should not be foreclosed from recognizing this reality, and affording plaintiff the relief to which it may entitle him.

As was observed by the Supreme Court of Oklahoma of a similar attempt by the NCAA to insulate from judicial scrutiny actions it had taken which affected, through a member university, certain coaching employees:

> Courts are normally reluctant to interfere with the internal affairs of voluntary membership associations, however, in particular situations, where the considerations of [public] policy and justice are sufficiently compelling judicial scrutiny and relief are available. In dealing with an organization in which membership is an economic necessity, the courts must be particularly alert to the need for protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity to earn a livelihood while not impairing the proper standards and objectives of the organization. The necessity of court action is apparent when the position of a voluntary association is so dominant in its field that membership in a practical sense is not voluntary but economically necessary.

Bd. of Regents v. Nat. Collegiate Ath. Ass'n, 561 P.2d 499, 504 (Okla.1977) (footnotes omitted).

It is therefore clear that the instant case falls squarely within the mandate of NRCP 19(a). We note that the briefs of the parties have cited a number of cases from the federal jurisdictions discussing Fed.R.Civ.Proc. 19(b), which addresses the situation in which a party *cannot* be joined. In such a situation, considerable weight is given the positions taken during litigation by the parties themselves, and to the fact that reversal will require dismissal of the entire action. *See esp., Provident Bank v. Patterson,* 390 U.S. 102, 88 S.Ct. 738, 19 L.Ed.2d 936 (1968). In this case, however, there is no contention that the NCAA is not amenable to service of process or that its joinder would affect the jurisdiction of the court

below.[2] In such circumstances, consideration of the issues raised by NRCP 19(b) is not warranted. *See Robinson v. Kind, supra,* 23 Nev. 330, 47 P. 977 (petition for rehearing).

Tarkanian, UNLV and the NCAA, each for its own reasons, preferred the trial to proceed without the joinder of the NCAA. This course did not serve the interest of justice or comply with the requirement of NRCP 19(a). Remand of the action will, in this case, serve the interest of judicial efficiency by precluding subsequent litigation of the very issues now presented.

We therefore reverse and remand for joinder of the NCAA and further proceedings.

THOMPSON, MANOUKIAN and BATJER, JJ., concur.

GUNDERSON, Justice, concurring.

As my colleagues hold, the NCAA is a necessary party to this litigation. Therefore, I agree it was improper for the district court to act in these premises, without requiring the NCAA's joinder. In the absence of such a joinder, however, I also believe there would be no bona fide, justiciable controversy.

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2. To the contrary, see Corresp. File, affidavit of M. Soloman, 5/8/78; and Amicus Curiae Opposition to Motion to Strike Brief, 5/16/78.

DOCUMENT F

(Filed October 12, 1977)

CASE NO. A 173498
DEPT. NO. II

IN THE
EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA, et al,
Defendants.

JUDGMENT

This matter having come on regularly for a trial before the Court upon the Complaint of Jerry Tarkanian, Samuel S. Lionel, Esq. and Mark A. Solomon, Esq. of Lionel Sawyer & Collins appearing on behalf of the plaintiff, and Thomas G. Bell, Esq. and Roy E. Smith, Esq. of Jones, Jones, Bell, Close & Brown appearing on behalf of the defendants; and the Court having heard the testimony examined the proof offered, and having considered arguments on behalf of the plaintiff and defendants, and the cause having been submitted to the Court for a decision on September 26, 1977, and the Court being fully advised in the premises and having rendered a decision in the cause, and based upon the Findings of Fact and Conclusions of Law made herewith, it is hereby

ORDERED, ADJUDGED AND DECREED that defendants have arbitrarily and capriciously deprived plaintiff of his property and liberty without procedural or substantive due process of law and have further chilled and otherwise infringed upon plaintiff's freedom of association all in violation of the Fourteenth Amendment to the Constitution of the United States of America; and it is further

ORDERED, ADJUDGED AND DECREED that defendants, and their respective agents, officers, servants and employees, and each of them, and all persons in active concert or participation with them shall be, and are hereby permanently enjoined and restrained from imposing a severance of any relations plaintiff may have formally or informally, with UNLV's intercollegiate athletic program, including, but not limited to, activities associated with administration, supervising, coaching, recruiting, athletic booster groups and public relations or fund-raising activities related to UNLV's athletic program, or any other action or proceeding against plaintiff on the basis of any findings or matters contained in the National Collegiate Athletic Association Confidential Report No. 123(47) [Case No. 443, UNLV]; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff shall recover of defendants as damages, attorneys' fees and costs, and the Court shall retain jurisdiction to make other and further orders with respect thereto should the parties fail to agree as to the respective amounts thereof; and it is further.

ORDERED, ADJUDGED AND DECREED that the Clerk of the above-entitled Court shall forthwith deliver to plaintiff's attorneys the $100.00 cash bond which was

posted pursuant to the Temporary Restraining Order entered and filed herein on September 8, 1977.

DATED this 12th day of October, 1977.

/s/ James Brennan
District Judge

Submitted by:

Lionel Sawyer & Collins
By /s/ Samuel S. Lionel
Samuel S. Lionel, Esq.
Attorneys for Plaintiff
300 South Fourth St. #1700
Las Vegas, Nevada 89101

DOCUMENT G

(Filed August 6, 1979)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA,
LAS VEGAS

Civ-LV-79-170, RDF

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA, et al.,
Petitioners.

JOINT PETITION FOR REMOVAL

Come now all the defendants to the above-entitled cause, by and through their respective Counsel, and jointly file this "Petition For Removal" of the said above-entitled cause from the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, to the United States District Court for the District of Nevada, Las Vegas. Petitioner, The National Collegiate Athletic Association (NCAA) is appearing for purposes of removal, and for no other purpose. In support of this Petition, Petitioners state to the Court as follows:

1. On or about September 8, 1977, plaintiff filed an action in the Eighth Judicial Circuit Court of Nevada in and for Clark County seeking declaratory and injunctive relief. Named as defendants were the UNIVERSITY

OF NEVADA, UNIVERSITY OF NEVADA, LAS VEGAS, DONALD H. BAEPLER, President, and nine members of the Board of Regents of the UNIVERSITY OF NEVADA. A true copy of Plaintiff's said original Complaint is attached hereto as Exhibit A. Said cause was assigned Case No. A173498.

2. The said District Court, after a hearing, thereafter entered a permanent injunction in favor of plaintiff and against the defendants in that cause, a true copy of which is attached hereto as Exhibit B.

3. The named defendants duly appealed and the Supreme Court of Nevada, on May 17, 1979, reversed the judgment of the District Court of Nevada, under the requirement of NRCP 19 (a) and stated:

> "In the case at hand, it is clear from the pleadings, the evidence presented at trial, and the judgment, that the NCAA should have been joined in this action."

A true copy of the Supreme Court's opinion is attached hereto as Exhibit C.

4. Thereafter, on July 12, 1979, an "Amended and Supplemental Complaint" was filed in the Eighth Judicial District Court of Nevada in and for the County of Clark, under Case No. A174398, naming as defendant for the first time the National Collegiate Athletic Association (NCAA). Additionally, other new persons were named as defendants in their capacity as president of University of Nevada, Las Vegas, and new Trustees. Summons and process were duly issued by the Clerk of the District Court of Clark County, Nevada and purportedly served on the NCAA along with the Order of

the District Court dated July 11, 1979, by serving the NCAA in Johnson County, Kansas on July 18, 1979. True and complete copy of said papers are attached hereto as Exhibit D.

5. On July 23, 1979, the plaintiff delivered his "Second Amended and Supplemental Complaint" to the attorney for all defendants except the NCAA, which now inserts the name of the NCAA among the defendants in Paragraph I and the prayer for relief. A true copy of said Second Amended & Supplemental Complaint is attached hereto as Exhibit E.

6. Copies of all other process, pleadings and orders served upon the original defendants are hereby attached as Exhibit F.

7. Plaintiff's Second Amended and Supplemental Complaint (as well as his Amended Complaint) charges that the Petitioners have violated his Constitutional rights to due process under the Fourteenth Amendment to the Constitution of the United States (Paragraphs I, XXVII and prayer for relief of the Complaint). Plaintiff further alleges in Paragraph VII of the said Complaint that the NCAA and state-supported universities are sufficiently intertwined so that the activities of the Petitioner NCAA "constitute state action". Therefore this is a civil action of which this Court has original jurisdiction under the provisions of Title 28, United States Code, Sections 1343 (3) and (4) and is one that can be removed by defendants pursuant to the provisions of Title 28, United States Code, Section 1441, in that it is a civil action seeking to redress alleged deprivations, under color of state law, statutes, ordinances, regulations, customs or usages, of rights, privileges or immunities secured by the Constitution of the United States.

8. Said Amended and Supplemental Complaint, by adding the NCAA as a new party defendant, so changed the nature and substance of the matter as to constitute a new suit for purposes of removal, as the Supreme Court of Nevada in its judgment reversing the original judgment decreed that plaintiff was not entitled to any relief in his first suit unless and until he sued the defendant NCAA.

9. The NCAA is an unincorporated association consisting of approximately 860 members (including the University of Nevada, Las Vegas) located throughout all the states. Plaintiff's Amended Complaint is an attack on the policies, procedures and guidelines employed by the NCAA's Committee on Infractions, claiming that such are "wholly inconsistent with the mandates of minimal due process of law" (Complaint, Par. XV). As such, he seeks to have the Court determine that the NCAA's procedures, adopted by and governing the approximately 860 member colleges and universities throughout the United States, are unconstitutional and invalid.

10. The Amended Complaint now puts directly in issue plaintiff's claims that he has been denied due process by virtue of the Association's procedures, and, for the first time in the litigation he has directly confronted the new defendant, the NCAA, with such claims. As such, the Amended Complaint substantially changes the nature and substance of his claim.

11. All defendants now join in this petition to remove.

12. Petitioners file and present herewith a bond as required by law with good and sufficient surety conditioned that the Petitioners will pay all of the costs and

disbursements by reason of the removal proceedings hereby brought should it be determined that this action is not removable or is improperly removed.

WHEREFORE, Petitioners, UNIVERSITY OF NEVADA, UNIVERSITY OF NEVADA, LAS VEGAS, DR. LEONARD GOODALL, LILLY FONG, JAMES BUCHANAN II, ROBERT CASHELL, CHRIS KARAMANOS, MOLLY KNUDTSEN, DR. LEWIS LOMBARDI, JOHN McBRIDE, BRENDA MASON, JOHN TOM ROSS and THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION respectfully pray that the above action now pending against them in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark be removed to this Court.

The National Collegiate Athletic Association
By /s/ George H. Gangwere
Its Agent and Attorney
Swanson, Midgley, Gangwere, Thurlo & Clarke
1500 Commerce Bank Building
Kansas City, Missouri 64106
(816) 842-9692
and
Weiner, Goldwater & Waldman, Ltd.
Suite 703 First National Bank Building
320 East Carson Avenue
Las Vegas, Nevada 89101
(702) 382-9666

University of Nevada, University of Nevada, Las Vegas, Dr. Leonard Goodall, Lilly Fong, James Buchanan II, Robert Cashell, Chris Karamanos, Molly Knudtsen, Dr. Lewis Lombardi, John McBride, Brenda Mason and John Tom Ross
By /s/ Roy E. Smith
Their Agent and Attorney
Jones, Jones, Bell, Close & Brown, Ltd.
Suite 700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 385-4202

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

GEORGE H. GANGWERE, of lawful age, being first duly sworn upon his oath, states that he is the Agent and Attorney of Record for The National Collegiate Athletic Association, a voluntary unincorporated association, one of the Petitioners herein; that he makes this affidavit for it and on its behalf and by its authority; that he has read the foregoing Joint Petition For Removal and that all of the statements, allegations, averments and exhibits which are respectively contained therein or attached thereto are true and correct to the best of his knowledge, information and belief.

/s/ George H. Gangwere

Subscribed and sworn to before me this 31st day of July, 1979.

/s/ Irene Andrist
Notary Public

My commission expires: April 9, 1981.

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

ROY E. SMITH, of lawful age, being first duly sworn upon his oath, states that he is the Agent and Attorney of record for UNIVERSITY OF NEVADA, UNIVERSITY OF NEVADA, LAS VEGAS, DR. LEONARD GOODALL, LILLY FONG, JAMES BUCHANAN II, ROBERT CASHELL, CHRIS KARAMANOS, MOLLY KNUDTSEN, DR. LEWIS LOMBARDI, JOHN McBRIDE, BRENDA MASON and JOHN TOM ROSS, Petitioners herein; that he makes this affidavit for them and on their behalf and by their authority; that he has read the foregoing Joint Petition For Removal and that all of the statements, allegations, averments and exhibits which are respectively contained therein or attached thereto are true and correct to the best of his knowledge, information and belief.

/s/ Roy E. Smith

Subscribed and sworn to before me this 2nd day of August, 1979.

/s/ Elaine McBride
(Seal) Notary Public

My commission expires: April 28, 1982.

DOCUMENT H

(Filed February 19, 1980)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil LV 79-170 RDF

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA; UNIVERSITY OF NEVADA, LAS VEGAS; DR. LEONARD GOODALL, as President of the University of Nevada, Las Vegas, and an Officer of the University of Nevada; and LILLY FONG, JAMES BUCHANAN II, ROBERT CASHELL, CHRIS KARAMANOS, MOLLY KNUDTSEN, DR. LEWIS LOMBARDI, JOHN McBRIDE, BRENDA MASON, and JOHN TOM ROSS, as Members of the Board of Regents of the University of Nevada; and the NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association,
Defendants.

ORDER GRANTING MOTION TO REMAND

On September 8, 1977, Jerry Tarkanian, the head basketball coach at the University of Nevada, Las Vegas (UNLV), a branch or a division of the University of Nevada system, filed suit in the Eighth Judicial District Court of the State of Nevada seeking declaratory and injunctive relief against alleged violations of his right

to due process and freedom of association. The suit arose out of the attempt by UNLV to remove Tarkanian from his position at the school and to sever all ties between him and the institution's intercollegiate athletic program as a result of an investigation and recommendation of the National Collegiate Athletic Association (NCAA). The defendants in the suit in addition to UNLV were the University of Nevada, the president of UNLV, and members of the Board of Regents of the University of Nevada. The original defendants will be referred to hereinafter as "the Nevada defendants." The Nevada court, after a hearing, entered a permanent injunction in favor of Tarkanian. On appeal to the Nevada Supreme Court, the district court judgment was reversed and remanded on the ground that Rule 19(a) of the Nevada Rules of Civil Procedure required the joinder of the NCAA. *University of Nevada v. Tarkanian*, 95 Nev. ....., 594 P.2d 1159 (1979).

The NCAA is an unincorporated, voluntary association whose members include approximately 860 colleges and universities, including UNLV, in all fifty states. Its headquarters are in Shawnee Mission, Kansas. The NCAA adopts regulations governing the conduct of intercollegiate athletic programs by the member institutions. The NCAA also conducts investigations, through its committee on infractions, as to compliance of member institutions. Upon a finding of a violation, the NCAA may impose a variety of sanctions.

On July 18, 1979, the NCAA was served in Kansas with an amended complaint that named the association as a defendant. A second amended complaint, adding the NCAA to the allegations of paragraph I, was served on counsel for all defendants except the NCAA, on July 23,

1979. On August 6, 1979, all the defendants filed a Joint Petition for Removal of the action to this court pursuant to Title 28, § 1441 et seq., of the United States Code. The petition alleges that the addition of the NCAA substantially altered the nature of the claim asserted.

The NCAA has moved to be dismissed as a defendant on the ground that, as an unincorporated association, it is not amenable to being sued in its own name under the laws of Nevada. The plaintiff has moved to remand the case to the state court on the ground that removal was improper because the case was not removed within thirty days from the time the pleadings were served on the first defendant.

A. The Motion to Remand

This action seeking redress of alleged deprivations of plaintiff's right to due process and freedom of association is clearly such as is normally removable under Title 28, U.S.C., § 1441(b). Moreover, it has been so since its original filing. It was and is a civil action of which the District Courts of the United States "have original jurisdiction founded on a claim or right arising under the Constitution of the United States." Such original jurisdiction is conferred by 28 U.S.C. § 1343(3). In such federal question cases, diversity is not a prerequisite to removal.

This Court is faced, however, with a challenge to the propriety of the removal procedure. The legal basis for the plaintiff's motion to remand the action to the state court is well articulated in a recent decision from the Southern District of Texas:

> "It is a general rule that all defendants, except purely nominal parties, who have been served and

who may properly join in a removal petition, must so join in order to effect removal. 28 U.S.C. § 1441 (a); 1A Moore's Federal Practice (Moore's) paragraph 0.168[3.-5] pp. 447-448; Perrin v. Walker, 385 F.Supp. 945 (E.D.Ill. 1974); Tri Cities Newspapers Inc. v. Tri Cities Printing Pressmen and Assistants Local 349, 427 F.2d 325 (5th Cir. 1970). In other words, unanimity among all defendants substantively entitled to remove is required for removal. Section 1446(b) states that a petition for removal shall be filed within thirty days 'after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading . . .' 28 U.S.C. § 1446(b). Since unanimity of all defendants is required for removal, the rule has evolved that if the first defendant served does not file a petition for removal within thirty days of service, he waives his right to remove. Thus subsequently served defendants who attempt to remove within thirty days of their service may not remove since they could not include the first defendant in their petition for removal. 1A Moore's paragraph 0.168[3.-2] p. 451, n. 18, paragraph 0.168[3.-5] p. 478; Transport Indemnity Co. v. Financial Trust Co., 339 F.Supp. 405 (C.D.Cal. 1972); Crocker v. A. B. Chance Co., 270 F.Supp. 618 (S.D.Fla. 1967); Fugard v Thierry, 265 F.Supp. 743 (N.D.Ill. 1967); Hutchins v. Priddy, 103 F.Supp. 601 (W.D.Mo. 1952). Failure of a defendant to seek removal within the thirty day time limitation may not be cured retroactively by consenting to and joining a subsequently served defendant's petition for removal. Transport Indemnity Co. v. Financial Trust Co., supra; Perrin v. Walker, supra; Manis v. North American Rockwell

Corp., 329 F.Supp. 1077 (C.D.Cal. 1971); Maybruck v. Haim, 290 F.Supp. 721 (S.D.N.Y. 1968). Although the thirty day time limitation is not jurisdictional, it is a formal rule of procedure, Adams v. Western Steel Building, Inc., 296 F.Supp. 759 (D.Colo. 1969), which is strictly applied. Perrin v. Walker, supra; Vendetti v. Schuster, 242 F.Supp. 746 (W.D.Pa. 1965).

"Pursuant to 28 U.S.C. § 1447(c) a case removed 'improvidently' shall be remanded to the state court. A removal is improvident if there is not compliance with the thirty day filing requirement. London v. United States Fire Ins. Co., 531 F.2d 257 (5th Cir. 1976); In Re Merrimack Mutual Fire Ins. Co., 587 F.2d 642 (5th Cir. 1978)."

Friedrich v. Whittaker Corp., 467 F.Supp. 1012, 1013-14 (S.D.Tex. 1979).

There are two situations in which the thirty-day time period for removal may be "revived" at some point beyond the filing or service of what is strictly the "initial pleading" of a given action. The first is statutorily based. Section 1446(b) of Title 28 provides that if an action was not removable at the filing of the initial pleading but becomes so by some change in the circumstances of the case, the thirty-day period commences to run from the point of such change. This statutory provision is clearly inapplicable here, the action having been removable at the outset. The other exception is apparently judicially created. Courts have held that the right to removal may be revived if there has been a very substantial alteration in the nature of the action. The NCAA contends that such a change occurred with its addition as a defendant by amendment of the complaint.

The rationale behind the principle of reviving the right to remove upon substantial alteration is explained in the following quotation which also sets forth the test to be applied in determining whether the principle should be invoked:

> "If the action could have been removed initially but was not, an amendment of the claim does not generally revive the right of removal. See City of Waterbury v. H. L. Yoh Co., 253 F.Supp. 778 (D.Conn. 1966); Lacy v. Mid-Continent Cas. Co., 247 F.Supp. 667, 670 (S.D.Tex. 1965); 1A J. Moore, Federal Practice 1242-43 (1965).
>
> "However, these principles must be tempered with the recognition that '[w]illingness to remain in the state court for one cause of action does not show a willingness, or constitute a waiver, as to some quite different cause.' Garden Homes, Inc. v. Mason, 143 F.Supp. 144, 145 (D.Mass. 1956), citing Henderson v. Midwest Ref. Co., 43 F.2d 23 (10th Cir. 1930). Though the right of removal may have been present and waived in the first instance, a sufficiently substantial change in the nature of the action may re-afford the opportunity. See Henderson v. Midwest Ref. Co., supra; Fugard v. Thierry, 265 F.Supp. 743, 745 (N.D. Ill. 1967); City of Waterbury v. H. L. Yoh Co., supra; Garden Homes, Inc., v. Mason, supra; Baron v. Brown, 83 F.Supp. 520 (S.D.N.Y. 1949). *The question is whether the alteration has 'so changed the character of the litigation as to make it substantially a new suit begun that day.'* Fletcher v. Hamlet, 116 U.S. 408, 410, 6 S.Ct. 426, 427, 29 L.Ed. 679 (1886)."

Adams v. Western Steel Buildings, Inc., 296 F.Supp. 759, 761-62 (D. Colo. 1969) (emphasis added).

The defendant relies on several turn-of-the-century cases that stand for the proposition that the addition of a defendant "revives" the right of removal. The modern cases, however, unanimously hold to the contrary position. The modern view is based on the requirement of unanimity among defendants in seeking removal. When original defendants fail to seek removal, they are deemed to have waived the right and are thus precluded from joining a subsequent petition and thereby defeat it. See, e.g., *Fugard v. Thierry*, 265 F.Supp. 743, 745 (N.D. Ill. 1967).

The NCAA notes that as originally filed, this action challenged only the procedures invoked by UNLV and the other defendants in connection with the attempted removal of the plaintiff from his position as head basketball coach. The amended complaint on the other hand, argues the NCAA, challenges for the first time the NCAA's rules and regulations. It is readily apparent that the addition of the NCAA did add significant new elements which were not part of the suit as originally filed. But these modifications affect only the NCAA. The claims against the Nevada defendants remain unchanged. That was precisely the situation in *Fugard v. Thierry*, supra. There the original complaint alleged breach of contract against a single defendant. An amendment added other defendants charging them with inducement of the breach. Since the complaint remained unchanged with respect to the original defendant, the District Court in Northern Illinois ruled that that defendant could not join the new defendants' petition for removal and therefore removal was precluded.

Appiying the same principles to the case before this Court, it appears that the action was improvidently re-

moved from state court and must be remanded. The Nevada defendants, against whom the claims remain identical to those originally filed, have waived their right to seek removal. Therefore, the petition of the NCAA must fail for lack of joinder of all defendants in the petition to remove.

The NCAA has also argued that it would be unjust to deny removal in this instance where the interests of colleges and universities from around the country are at stake for the first time. While this argument does have a certain emotional appeal, particularly in a situation in which the true adversity of the original parties might reasonably be questioned,[1] the requirement of unanimity among the defendants and the concept of waiver by failure to assert the right to remove at the earlier available time are too well entrenched. The right to remove is a statutory privilege that is strictly construed. See 1A *Moore's Federal Practice*, paragraph 0.157[1.-3]. Moreover, if the NCAA had been made an original defendant, the Nevada defendants could have defeated removal from the outset by refusing to join the removal petition no matter how important the interests of the nonresident defendant or the members it represents, and no matter how strongly the nonresident may wish to avoid potential prejudice of the Nevada courts. When Judge Arraj spoke of determining whether "it would be manifestly unjust to deny a new chance at removal in view of substantial changes in the nature and substance of the claims asserted," *Adams v. Western Steel Buildings, Inc.*, supra, 296 F.Supp. at 762, he was not setting out a new test for revival of the right

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1. See University of Nevada v. Tarkanian, 95 Nev. ....., 594 P.2d 1159, 1165 (Gunderson, J., concurring) (noting that absent the joinder of NCAA he was of the opinion that there would be no justiciable controversy).

to remove. Rather, he was still working within the context of a change that is so substantial as to essentially constitute a new action. With respect to the Nevada defendants here, there has been no such drastic change. Therefore, they are precluded from joining the NCAA's petition to remove which in turn defeats the removal effort. This action, having been improvidently removed to federal court, must be remanded to the state court.

B. Motion to Dismiss

There is authority for the position that, if there exist grounds for dismissal, the Court should so rule before deciding, if necessary, the question of remand. See *Block v. Block*, 196 F.2d 930, 933 (7th Cir. 1952); *Friedrich v. Whittaker Corp.*, 467 F.Supp. 1012, 1014 (S.D. Tex. 1979); *Amins v. Life Support Medical Equipment Corp.*, 373 F. Supp. 654, 656 (E.D.N.Y. 1974); *Pliler v. Asiatic Petroleum Co. (Texas), Ltd.*, 197 F.Supp. 212 (S.D. Tex. 1961); 1A *Moore's Federal Practice*, paragraph 0.169[1], pp. 559-60. See also *State of Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654, 658-59 (9th Cir. 1972) (recognizing the rule that if the state court lacked jurisdiction, federal court must dismiss). If this Court adopted that position, it would be necessary to rule on the defendant NCAA's motion to dismiss before considering the motion to remand the case to the Nevada court.

Unfortunately, the cases cited above do not expostulate a rationale for preferring dismissal to remand, nor is the reason readily apparent in most cases. Cf. *State of Washington v. American League of Professional Baseball Clubs*, supra; *Friedrich v. Whittaker Corp.*, supra (where the objection to state court jurisdiction is based on the existence of exclusive federal jurisdiction of the action, the inappropriateness of remand is obvious). It may be that in most cases a dismissal will dispense with any further proceedings in the case, particularly if there is a single claim against a single defendant. In such situations, remand will simply delay the inevitable result. Ironically, perhaps, the only exposition of a rationale for the rule appears in a decision which adopts the position that a court has disretion to dispose of the action on whichever ground (dismissal or remand) is most convenient or appropriate in the circumstances. Affirming a district court's disposition of an action with respect to one of two defendants on a motion to dismiss, the Fifth Circuit said:

> "Since this case was, under the terms of the removal statute, unquestionably in the district court even though later subject to a proper motion for remand, if a suit could properly be pending anywhere, once it became apparent by the filing of the motion to quash service of process that there was a question raised by the defendant below whether it could properly be brought into court in Mississippi under any circumstances, it was proper for the trial court to examine into this question immediately and not subject the defendant, so protesting, to a further hearing on the motion to remand and possibly to a further hearing in a state court where it would then have to raise once again the question of personal jurisdiction. Once appellee lodged in the district court its challenge to the jurisdiction in personam, it was entirely appropriate for that court to inquire into, and resolve, that issue." *Walker v. Savell*, 335 F.2d 536, 539 (5th Cir.1964).

Nevertheless, it is clear that the Fifth Circuit did not wish to foreclose the possibility that in another situation

a district court might not properly choose remand over consideration of a motion to dismiss. The Court quoted approvingly from *Garden Homes v. Mason*, 238 F.2d 651, 654 (1st Cir. 1956), wherein the First Circuit indicated that the question of which method of disposition should be used might be within the discretion of the Court. 335 F.2d at 539. The First circuit avoided a definitive holding on that issue in *Garden Homes* by pointing out that there the removal had been clearly proper. Indeed, one district court recently did remand without considering the motion to dismiss. In *Limbach Co. v. Renaissance Center Partnership*, 457 F.Supp. 347, 349 (W.D. Pa. 1978), Judge Zeigler wrote:

> "In the case at bar, it would be inappropriate and possibly unjust to Limbach to adjudge defendant's motion to dismiss before remanding and we decline to do so. As our earlier analysis revealed, this court lacks diversity jurisdiction. Accordingly, if we determined the existence of personal jurisdiction over defendant, we would still be required to remand to state court. Moreover, questions of personal jurisdiction raise complex issues relating to defendant's contacts with Pennsylvania. The parties would be entitled to extensive discovery. Time would be expended before the court could resolve the issue, thereby further delaying the action.
>
> "We do not question defendant's motives in removing this case to this court. It should be noted, however, the question of personal jurisdiction could have been raised in state court following the filing of the complaint. Once the case is remanded to state court, the defendant can, of course, seek dismissal at that time; therefore, the court foresees little, if any,

> prejudice resulting from our decision to remand rather than deciding defendant's motion to dismiss."

This Court believes that in the present action there are several reasons which favor the remand without consideration of the NCAA's motion to dismiss. First, this is not a case in which the state court's lack of jurisdiction, if such is the case, is obvious. Cf. *Block v. Block*, supra (no service of process). Second, and perhaps most important, the merits of the NCAA's motion to dismiss turns upon an interpretation of Nevada law. The federal courts are hesitant to undertake such an endeavor whenever it may be avoided. Unlike several cases enunciating the preference for disposition on a motion to dismiss, this is not a case where the question turns upon the application of established, or at least well-charted, state law to the specific facts of a new case. Cf. *Walker v. Savell*, supra (Mississippi's long-arm statute); *Amins v. Life Support Medical Equipment Corp.*, supra (New York's); *Pliler v. Asiatic Petroleum Co. (Texas), Ltd.*, supra (Texas'). Rather, this motion asks this Court to pass on an issue upon which the Nevada court has yet to definitively speak, namely, the extent to which NRS § 12.110 did away with the common law rule that an unincorporated association could not be sued in its own name. The two cases relied on by the NCAA in support of its motion, *Owens v. International Association of Heat and Frost Insulators and Asbestos Workers*, 213 F.Supp. 927 (D. Nev. 1963), and *Hanley v. Sheet Metal Workers International Association*, 72 Nev. 52, 293 P.2d 544 (1956), both dealt only with the sufficiency of process upon unincorporated associations, and not the more fundamental issue of amenability to suit. Indeed, in *Owens*, this Court expressly declined to rule on that question, 213 F.Supp. at 929. Finally, even if this

Court were to grant the NCAA's motion to dismiss, the controversy would not be resolved. It would then be incumbent upon this Court to determine whether, in light of the Nevada Supreme Court's holding that the NCAA was a party to be joined under Rule 19(a), Nev. R. Civ. P., the action could be maintained in the NCAA's absence as a named defendant. This would be still one more question of state law which might be avoided by remand.

Therefore, in light of the foregoing, this Court is of the opinion that its discretion should be exercised to remand the case to the Nevada court without deciding the merits of the NCAA's motion to dismiss.

DATED: February 19th, 1980.

/s/ Roger D. Foley
District Judge

DOCUMENT I

(Filed July 17, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA,
LAS VEGAS

Case No. CV-LV 460 RDF

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA, et al.,
Defendants.

PETITION FOR REMOVAL

Comes now defendant The National Collegiate Athletic Association by and through its counsel and files this "Petition For Removal" of the said above-entitled cause from the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, to the United States District Court for the District of Nevada, Las Vegas. In support of this Petition, Petitioner states to the Court as follows:

1. On or about September 8, 1977, plaintiff filed an action in the Eighth Judicial Circuit Court of Nevada in and for Clark County seeking declaratory and injunctive relief. Named as defendants were the UNIVERSITY OF NEVADA, UNIVERSITY OF NEVADA, LAS VEGAS, DONALD H. BAEPLER, President, and nine members of the Board of Regents of the UNIVERSITY OF NEVADA.

A true copy of Plaintiff's said original Complaint is attached hereto as Exhibit A. Said cause was assigned Case No. A173498.

2. The said District Court, after a hearing, thereafter entered a permanent injunction in favor of plaintiff and against the defendants in that cause, a true copy of which is attached hereto as Exhibit B.

3. The named defendants duly appealed and the Supreme Court of Nevada, on May 17, 1979, reversed the judgment of the District Court of Nevada, under the requirement of NRCP 19 (a) and stated:

> "In the case at hand, it is clear from the pleadings, the evidence presented at trial, and the judgment, that the NCAA should have been joined in this action."

A true copy of the Supreme Court's opinion is attached hereto as Exhibit C.

4. Thereafter, on July 12, 1979, an "Amended and Supplemental Complaint, was filed in the Eighth Judicial District Court of Nevada in and for the County of Clark, under Case No. A174398, naming as defendant for the first time the National Collegiate Athletic Association (NCAA). Additionally, other new persons were named as defendants in their capacity as president of University of Nevada, Las Vegas, and new Trustees. Summons and process were duly issued by the Clerk of the District Court of Clark County, Nevada and purportedly served on the NCAA along with the Order of the District Court dated July 11, 1979, by serving the NCAA in Johnson County, Kansas on July 18, 1979. True and complete copies of said papers are attached hereto as Exhibit D.

5. On July 23, 1979, the plaintiff delivered his "Second Amended and Supplemental Complaint" to the attorney for all defendants except the NCAA, which added the name of the NCAA among the defendants in Paragraph I and the prayer for relief. A true copy of said Second Amended & Supplemental Complaint is attached hereto as Exhibit E.

6. On August 6, 1979, all of the defendants filed in the United States District Court For the District Of Nevada, Las Vegas, their Joint Petition For Removal and a Bond on Removal. Written notice of such filing was given the same date to plaintiff's counsel and the Clerk of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, true copies of such pleadings are attached. On August 13, 1979, plaintiff filed his Motion To Remand and his Points and Authorities in the federal court. On August 17, 1979, plaintiff filed with the federal court a copy of the Affidavit of Samuel S. Lionel certified to by the Clerk of the Supreme Court of Nevada. On August 28, 1979, the NCAA filed in the federal court its Request For Oral Arguments and its Points And Authorities In Opposition To Plaintiff's Motion to Remand. On September 10, 1979, plaintiff filed in the federal court his Reply To The National Collegiate Athletic Association's Points and Authorities In Opposition To Plaintiff's Motion To Remand. On February 19, 1980, U. S. District Judge Roger D. Foley entered his Order Granting Motion To Remand. True copies of the foregoing and other pleadings and orders filed in the U. S. District Court are attached hereto as Exhibits F-N.

7. After remand of the cause to the Eighth Judicial District Court Of The State of Nevada, UNLV and the NCAA filed their separate Answers to Plaintiff's Second Amended And Supplement Complaint, true copies of which are attached hereto as Exhibits O and P.

At the time of trial counsel for UNLV substituted as defendants the names of the current President and members of the Board of Regents of the University of Nevada for those named as defendants in the original complaint.

8. Trial in the Nevada court on plaintiff's Second Amended And Supplemental Complaint commenced on June 11, and ended on June 22, 1984. After the conclusion of trial and on June 22, 1984, plaintiff, the NCAA and UNLV filed with the Clerk of the Eighth Judicial District Court Of The State of Nevada and delivered to counsel for the other parties their trial briefs. Plaintiff served a Memorandum on Attorneys Fees on all parties in open court at the conclusion of the trial on June 22, 1984. True copies of the memorandum and trial briefs are attached hereto as Exhibits Q-T.

9. On June 25, 1984, Judge Paul S. Goldman, District Judge for the Eighth Judicial District Court Of The State Of Nevada, entered his Preliminary Statement, Findings Of Fact, Conclusions Of Law, Opinion, Order And Judgment. A true copy of such judgment is attached hereto as Exhibit U.

10. On or about June 26, 1984, plaintiff filed his Memorandum of Costs wherein he itemized and claimed entitlement to as court costs, *inter alia,* $168,364.70 as and for his attorney's fees. UNLV and the NCAA each filed their separate Motions to Retax and Settle Costs and on July 9, 1984, plaintiff filed and delivered to counsel for UNLV and the NCAA his Points and Authorities In Opposition to NCAA's Motion To Retax and Settle Costs and his Points and Authorities in opposition to UNLV's motion. True copies of these pleadings are attached hereto as Exhibits V-Z.

11. In its judgment entered June 25, 1984, the state court concluded that "the actions of the NCAA were (and are) 'state actions,' for constitutional and jurisdictional purposes" that both the NCAA and UNLV deprived plaintiff of procedural and substantive due process; that the decision of the NCAA that plaintiff should be suspended from his head coaching duties for two years was arbitrary and capricious and UNLV's decision to the same effect was "vicariously" arbitrary and capricious and that "no attorney's fee's may be awarded" because no proof on such fees was offered. The state court then enjoined UNLV and the NCAA from proceeding in any manner to carry out the NCAA's direction to UNLV to show cause why plaintiff should not be suspended from his head coaching position for a two-year period.

12. Copies of other process, pleadings and orders served upon the original defendants are hereby attached as Exhibit AA.

13. Plaintiff's Second Amended and Supplemental Complaint (as well as his Amended Complaint) charges that the Petitioners violated his Constitutional rights to due process under the Fourteenth Amendment to the Constitution of the United States (Paragraphs I, XXVII and prayer for relief of the Complaint). Plaintiff further alleges in Paragraph VII of the said Complaint that the NCAA and state-supported universities are sufficiently intertwined so that the activities of the Petitioner NCAA "constitute state action". The Second Amended and Supplemental Complaint challenged for the first time the NCAA rules and regulations and its conduct in the NCAA administrative-type hearings involving plaintiff and UNLV. Like plaintiff's challenge of UNLV's hearing made in the initial complaint, the challenge of the NCAA's conduct

at the hearings was under the due process clause of the Fourteenth Amendment of the U. S. Constitution. When the NCAA, joined by UNLV, attempted to remove the case to federal court in 1979, the U. S. District Court, Judge Roger D. Foley, ruled that although plaintiff for the first time had attacked the NCAA rules and regulations, the "modifications [made by plaintiff in amending his Complaint and adding the NCAA as a party-defendant] affect only the NCAA" and "[t]he claims against the Nevada defendants remain unchanged." (Exhibit N, p. 6). Therefore, it was on the sole basis that the plaintiff's claim against UNLV remained the same that Judge Foley ordered the cause remanded to the Nevada state court.

14. No further pleading, order or other paper in any way describing the nature of plaintiff's claim or the issues raised by his Complaint was filed with the Nevada court or received by the defendant until after completion of a trial in the Nevada court on June 22, 1984, when plaintiff filed his trial brief. On July 9, 1984, plaintiff filed his Points and Authorities wherein he urged the Nevada court to award him attorney's fees of $168,114.70 under USC § 1988 even though the court in its decision had ruled that attorney's fees could not be awarded under Nevada law.

15. Plaintiff first made his claim to entitlement of attorney's fees under § 1988 of the federal Civil Rights Act after the state court had conducted the trial and ruled that attorney's fees could not be awarded to plaintiff under Nevada law. Plaintiff's claim for an award of attorney's fees under § 1988 raises a new issue and is a sufficiently substantial change in the nature of the claim against, and the relief sought from, the NCAA,

that it affords a new opportunity to remove this action to the United States District Court.

16. The NCAA is the only real defendant in the action. During the trial, only the NCAA demonstrated an interest in defending against the plaintiff's claims. The Nevada court's written findings, conclusions and decision entered on June 25, 1984, recognizes UNLV's non-defendant status in this litigation. Although counsel for both plaintiff and UNLV carefully structured their respective pre-trial pleadings and conduct in a manner designed to give the appearance that UNLV was a legitimate defendant, the evidence offered by plaintiff and UNLV at trial and their pleadings and arguments post-trial clearly show that UNLV is at best a nominal defendant which properly should be realigned, for purposes of removal, as a party-plaintiff. For example, on several occasions during the course of trial, counsel for UNLV failed to register valid objections that it had as to the admissibility of evidence offered by plaintiff and supportive of plaintiff's allegations against defendants. In particular, counsel for UNLV stood mute while two attorneys who acted as legal counsel for UNLV in the NCAA proceedings testified for plaintiff as to matters within the scope of the attorney-client privilege. Further, those attorneys testified that, in their opinion as lawyers, there was no credible evidence to support the NCAA's findings that plaintiff had violated NCAA rules and that the NCAA Committee which made the finding acted in an arbitrary and capricious manner. As an additional example, at the conclusion of trial, counsel for plaintiff in arguing for an award of attorney's fees urged without solicitation from the Court that such an award should be assessed mostly or entirely against the NCAA.

The written transcript of the trial in state court (which is being prepared) will demonstrate that the only evidence offered to show that UNLV personally denied plaintiff procedural or substantive due process related to a hearing granted to plaintiff by UNLV in September, 1977. According to such evidence, the NCAA had directed UNLV to show cause to the NCAA why plaintiff should not be suspended from his head coaching position for a period of two years. This direction was based on the NCAA's determination that plaintiff had participated in certain violations of NCAA rules and regulations relating to the admission, eligibility and financial aid of basketball players at UNLV and in the NCAA's investigation of possible violations of NCAA rules. Plaintiff successfully urged to the Nevada court that after UNLV granted plaintiff a hearing on the NCAA show cause directive, UNLV reluctantly agreed to, and in fact did, suspend plaintiff from his head coaching position. The UNLV employee who conducted the UNLV hearing testified for plaintiff and stated that although plaintiff presented no evidence and no witnesses appeared, he gratuitously found that whether plaintiff was afforded due process in the NCAA proceedings was clearly in doubt. Plaintiff and UNLV each offered evidence that in arriving at the finding that plaintiff should be suspended, the NCAA, and only the NCAA, had deprived plaintiff of both procedural and substantive due process and that UNLV carried out the NCAA directive solely because of what the Nevada court characterized as an adhesion contract.

Under date of July 9, 1984, the new President, University of Nevada, Las Vegas, communicated to the NCAA his intention to not permit an appeal by UNLV of the Nevada court's decision and judgment. On July 16, 1984,

counsel for the NCAA requested that UNLV join in a petition for removal of this litigation to the U. S. District Court. UNLV through its counsel has declined to join in such a petition.

17. Defendant NCAA files and presents herewith a bond as required by law with good and sufficient surety conditioned that it will pay all of the costs and disbursements by reason of the removal proceedings hereby brought should it be determined that this action is not removable or is improperly removed.

WHEREFORE, Petitioner, The National Collegiate Athletic Association respectfully prays that the above action now pending against it in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark be removed to this Court.

David Goldwater, Ltd.
By /s/ David Goldwater
David Goldwater
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Swanson, Midgley, Gangwere,
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Attorneys for the National
Collegiate Athletic Association

STATE OF Nevada)
)
COUNTY OF Clark)

James H. McLarney, of lawful age, being first duly sworn upon his oath, states that he is the Agent and Attorney of Record for THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, a voluntary unincorporated association, one of the Petitioners herein; that he makes this affidavit for it and on its behalf and by its authority; that he has read the foregoing Petition For Removal and that all of the statements, allegations, averments and exhibits which are respectively contained therein or attached thereto are true and correct to the best of his knowledge, information and belief.

/s/ James H. McLarney

Subscribed and sworn to before me this 17th day of July, 1984.

/s/ Irene M. Flatt
Notary Public

(Seal)

My commission expires: June 16, 1987.

DOCUMENT J

(Filed November 15, 1984)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Civil LV 84-460 RDF

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA, et al., and NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association,
Defendants.

ORDER FOR REMAND

On July 17, 1984, the defendant National Collegiate Athletic Association (NCAA) petitioned to remove this case from the state court after trial and judgment had been entered in that court.

On August 9, 1984, plaintiff, joined by the University of Nevada, Las Vegas (UNLV), moved to strike NCAA's petition for removal or, alternatively, to remand the case to the state court.

On August 28, 1984, this court gave NCAA until October 31, 1984, to augment the record herein and stayed consideration of the motion to strike or remand until after October 31, 1984.

This court, in this same case, granted a motion to remand the matter to the state court on February 19, 1979. See Civil LV 79-170 RDF, order granting motion to remand.

Having carefully considered the matter again,

IT IS ORDERED that NCAA's pending petition for removal made after trial and judgment in the state court, is stricken. The case is again remanded to the state court.

DATED: November 15, 1984.

/s/ Roger D. Foley
District Judge

DOCUMENT K

(Filed March 25, 1985)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CV-LV-84-460-RDF

JERRY TARKANIAN,
Plaintiff/Appellee,

vs.

UNIVERSITY OF NEVADA, et al,
Defendants,

and

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant/Appellant.

ORDER ON MANDATE

The above-entitled cause having been before the United States Court of Appeals for the Ninth Circuit, and the Court of Appeals having on March 5, 1985 issued its mandate remanding the District Court Judgment, and the Court being fully advised in the premises, NOW, THEREFORE, IT IS ORDERED that the mandate be spread upon the records of this Court.

IT IS FURTHER ORDERED .....

Dated this 25 day of MARCH, 1985.

/s/ Roger D. Foley
Roger D. Foley
United States District Judge

DOCUMENT L

(Filed November 30, 1984)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-7825

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
Petitioner,

vs.

HONORABLE ROGER D. FOLEY; JERRY TARKANIAN; UNIVERSITY OF NEVADA; UNIVERSITY OF NEVADA-LAS VEGAS; DR. LEONARD GOODALL, as President of the University of Nevada-Las Vegas, and Officer of the University of Nevada; and FRANKIE SUE DEL PAPA, LILLY FONG, DOROTHY GALLAGHER, CHRIS KARAMANOS, JOAN KENNEY, DANIEL J. KLAICH, JOHN McBRIDE, JOANN SHERRIN and JUNE WHITELY, as Members of the Board of Regents of the University of Nevada,
Respondents.

PETITION FOR WRIT OF MANDAMUS

COMES NOW petitioner, The National Collegiate Athletic Association, and pursuant to Rule 21 of the Federal Rules of Appellate Procedure, petitions this Court for a Writ of Mandamus directed to the Honorable Roger D. Foley, Judge of the United States District Court for the District of Nevada, Las Vegas directing him to set aside his Order for Remand signed on November 15, 1984, and served upon petitioner on November 21, 1984.

INTRODUCTION

A writ of mandamus is the proper remedy to bring Judge Foley's Order for Remand before this Court for review. The Order for Remand should be set aside because Judge Foley exceeded the scope of his authority set forth in 28 U.S.C. §1447(c) in entering the order. Petitioner's Petition for Removal was proper and should be entertained by the federal district court in that respondent Tarkanian's request for attorney fees pursuant to 42 U.S.C. §1988 is a new, separate and independent cause of action. The petition is timely, having been filed within 30 days of service on petitioner of respondent Tarkanian's demand for attorney's fees pursuant to 42 U.S.C. §1988. It is not necessary for respondents University of Nevada-Las Vegas and the Board of Regents of the University of Nevada to join in the Petition for Removal, as their true interests lie with respondent Tarkanian, thereby justifying their realignment with him, at least for purposes of removal.

STATEMENT OF FACTS

Respondent Tarkanian instituted an action in the Eighth Judicial District Court of Nevada on September 8, 1977 seeking relief against the Board of Regents of the University of Nevada and the University of Nevada-Las Vegas for alleged violations of the Fourteenth Amendment to the United States Constitution. (EXHIBIT "A") Petitioner was not made a party to the action at that time. Following a hearing before Judge James Brennan, judgment was entered enjoining the University from disciplining respondent Tarkanian by temporarily suspending him from his head coaching duties at the University of Nevada-Las Vegas. (EXHIBIT "B") The University, upon

the urging of petitioner but with great reluctance, appealed the decision to the Supreme Court of Nevada. The Supreme Court reversed, citing respondent Tarkanian's failure to join a necessary and indispensable party, i.e. petitioner NCAA. (EXHIBIT "C") The omission was corrected when respondent Tarkanian filed his Amended and Supplemental Complaint on July 12, 1979 (EXHIBIT "D"), and again on or about July 23, 1979 when he filed his Second Amended and Supplemental Complaint, naming petitioner as an additional defendant. (EXHIBIT "E") That complaint, like its predecessors, sought relief only under the Fourteenth Amendment of the United States Constitution.

On August 6, 1979, all defendants named in the Second Amended and Supplemental Complaint filed in the United States District Court for the District of Nevada, Las Vegas their Joint Petition for Removal. (EXHIBIT "F") On August 13, 1979, respondent Tarkanian filed a Motion to Remand (EXHIBIT "G"), and petitioner's Points and Authorities in Opposition to the motion were filed on August 28, 1979. (EXHIBIT "H") Respondent Tarkanian filed his reply on September 10, 1979. (EXHIBIT "I") Judge Foley entered an Order Granting Motion to Remand on February 19, 1980 on the grounds respondents UNLV and the Board of Regents had waived their right to remove the case to federal court by not filing a petition for removal within thirty days of service of respondent Tarkanian's original petition. (EXHIBIT "J") Petitioner filed its Answer on August 18, 1983. (EXHIBIT "K")

The action finally came to trial on June 11, 1984 before Judge Paul Goldman. During opening argument, counsel for respondent Tarkanian made the statement that he was seeking relief pursuant to 42 U.S.C. §1983. This

was the first indication petitioner had that respondent Tarkanian's claim was grounded on §1983. At the conclusion of a ten-day trial, on June 22, 1984, respondent Tarkanian served on petitioner a trial brief, which for the first time revealed to petitioner his request for attorneys' fees pursuant to 42 U.S.C. §1988. (EXHIBIT "L") Judge Goldman entered judgment for respondent Tarkanian in a written opinion issued on Monday, June 25, 1984. (EXHIBIT "M") Although the judgment entered therein specifically excluded any award of attorney fees, respondent Tarkanian served a Memorandum of Costs on petitioner on June 26, 1984, in which he requested, among other things, attorney's fees of $168,364.70. (EXHIBIT "N") Petitioner objected to the Memorandum (EXHIBIT "O"), and a hearing before Judge Goldman was scheduled for July 17, 1984, to settle the costs.

Petitioner filed a Petition for Removal on July 17, 1984, on the basis that respondent Tarkanian's sudden request for attorney fees pursuant to 42 U.S.C. §1988 raised a new federal ground for removal jurisdiction (EXHIBIT "P"). In addition, petitioner asked the court to realign the University and the Board of Regents with respondent Tarkanian for purposes of removal because it had become evident that their true interests in this litigation rest with him. Respondents UNLV and the Board of Regents refused to join in the removal petition, and, in fact, announced they would not appeal Judge Goldman's order. Thereafter, on July 25, 1984, petitioner filed a Notice of Appeal to this Court of Judge Goldman's decision (EXHIBIT "Q") and also filed motions under Rule 59 of the Federal Rules of Civil Procedure in the District Court. (EXHIBIT "R")

On August 9, 1984, respondent Tarkanian filed in the District Court a Motion to Strike NCAA's Petition for Removal, Or, Alternatively, To Remand to State Court. (EXHIBIT "S") Concurrent with that filing, respondent Tarkanian requested a stay of the District Court's ruling on petitioner's Rule 59 Motions until the Motion to Strike had been decided, which motion has subsequently been joined in by the remaining respondents.

On August 28, 1984, petitioner sought and received an extension of time from the District Court to October 31, 1984, to respond to the Motion to Strike, so that it could obtain the transcript of the trial before Judge Goldman and more fully address the grounds for removal. (EXHIBIT "U")

The transcript was ordered by petitioner from Judge Goldman's court reporter in late July, 1984, at which time its completion was promised on or about October 20, 1984. In late October, petitioner was informed by the court reporter that the transcript could not be completed by October 31, 1984. On October 30, 1984, petitioner requested a second extension of time to respond to the Motion to Strike, again on the basis the transcript was a necessary part of the petitioner's removal action. (EXHIBIT "V") Then on November 15, 1984, without ruling on petitioner's second request for extension, Judge Foley entered the Order for Remand that is the subject of this Petition for Writ of Mandamus. (EXHIBIT "W")

I. WRIT OF MANDAMUS IS AN APPROPRIATE REMEDY TO REVIEW THE DISTRICT COURT'S ORDER OF REMAND

Federal courts are statutorily created courts, and as such have only that authority conferred on them by stat-

ute. *Sheldon v. Sill*, 49 U.S. 441, 449, 12 L.Ed. 1147 (1850); *Wright v. Atlas Production Credit Association*, 468 F.2d 997 (10th Cir. 1972); *Local Division 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority*, 667 F.2d 1327 (11th Cir. 1982). Where a court acts outside the authority granted by statute, mandamus is appropriate to direct the lower court to set aside its unauthorized act.

28 U.S.C. §1447(c) authorizes a federal court, in certain circumstances, to remand to state court cases which have been removed:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case. . . .

Where a court has remanded a case pursuant to authority granted under §1447(c), subsection (d) of that statute limits reviewability of the order for remand. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-6, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976). However, where the district court's remand order falls outside the terms of §1447(c) and the court has thus exceeded its authority, reviewability is not limited by subsection (d), and review by mandamus is available to set aside the Order of Remand and direct the lower court to assume jurisdiction over the case. *Thermtron Products*, 423 U.S. at 352-53.

The Federal Courts have identified two situations in which an order for remand falls outside the terms of §1447(c), both of which are applicable to the instant case: (1) the order fails to invoke the grounds specified in §1447(c); and (2) the order is issued after judgment.

A. Judge Foley's Order Does Not Rely On The Grounds Set Forth in §1447(c)

Section 1447(c) set forth above speaks to the remand of a case that "was removed improvidently and without jurisdiction." When the order of remand fails to invoke these grounds, the district court has exceeded its authority and its order should be reviewed by mandamus.

In *Thermtron Products, supra,* the district court justified remand of the case to state court because of its crowded docket and what it perceived to be an impairment of plaintiff's right of redress resulting therefrom. The Sixth Circuit denied defendants' petition for writ of mandamus, concluding that the district court had jurisdiction to enter the remand order and it was prohibited by §1447 (d) from reviewing that order. In reversing and remanding, the Supreme Court held that the district court had exceeded its authority in remanding on grounds not permitted by the controlling statute. 423 U.S. at 345. The Court further concluded that "only remand orders issued under §1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." 423 U.S. at 346. Finally, "because an order remanding a removed action does not represent a final judgment reviewable by appeal," an appellate court unquestionably has the power to issue mandamus to remedy the error and require the lower court to entertain the action. 423 U.S. at 352-353.

Similarly, in *Sheet Metal Workers Int'l Assoc., AFL-CIO v. Seay,* 693 F.2d 1000 (10th Cir. 1982), *modified in part on other grounds,* 696 F.2d 780 (10th Cir. 1983), the district court had remanded the case to state court on the ground that the injunctive relief sought by plaintiff was available in state, but not federal, court. In affording relief by mandamus, the Tenth Circuit stated:

> We are persuaded that the remand order was improperly grounded on considerations not within the bounds of the removal statute, and under standards laid down by the Supreme Court in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542, we conclude that *we must grant the writ.*

(emphasis added) *Id.* at 1001. *See also, In Re Shell Oil Co.,* 631 F.2d 1156 (5th Cir. 1980); *In Re Greyhound Lines, Inc.,* 598 F.2d 883 (5th Cir. 1979).

The "Order for Remand" entered by Judge Foley in the instant case states:

> On July 17, 1984, the defendant National Collegiate Athletic Association (NCAA) petitioned to remove this case from the state court after trial and judgment had been entered in that court.
>
> On August 9, 1984, plaintiff, joined by the University of Nevada, Las Vegas (UNLV, moved to strike NCAA's petition for removal or, alternatively, to remand the case to the state court.
>
> On August 28, 1984, this court gave NCAA until October 31, 1984, to augment the record herein and stayed consideration of the motion to strike or remand until after October 31, 1984.
>
> This court, in this same case, granted a motion to remand the matter to the state court on February 19, 1979. See Civil LV 79-170 RDF, order granting motion to remand.
>
> Having carefully considered the matter again,
>
> IT IS ORDERED that NCAA's pending petition for removal made after trial and judgment in the state

court, is stricken. The case is again remanded to the state court.

While it is difficult to discern the basis of the District Court's order, it is clear that the order does not rely on the grounds enumerated in §1447(c). Accordingly, the District Court exeeded its authority in entering this order, and the order should be set aside by a writ of mandamus.

B. Judge Foley's Order For Remand Was Not Entered Before Judgment As Required By §1447(c).

The Order for Remand is also reviewable because §1447(d) applies only to remand orders entered "before final judgment." 28 U.S.C. §1447(c). Review by mandamus is thus appropriate when the remand order has been issued outside the time frame specified in §1447(c). *In Re Carter,* 618 F.2d 1093, 1097 (5th Cir. 1980), cert. denied, 450 U.S. 949, 101 S.Ct. 1410, 67 L.Ed.2d 378 (1981). In *Carter,* plaintiff brought suit in a Georgia state court against a local and an international labor union. The local union answered the complaint while the international did not, filing instead a motion to quash service and to dismiss. These motions were overruled, and judgment by default was entered against the international union for failure to answer plaintiff's petition. Before trial, plaintiff dismissed the local union, and the court thereafter submitted the issue of damages to a jury, which returned a verdict in excess of $60,000. This judgment was ultimatly reversed on appeal by the Georgia Supreme Court on the ground that the international union was not validly served with process. The action was reinstituted and it removed the action to federal court alleging federal case jurisdiction. At the pretrial conference in federal court, plaintiff represented that he intended to pursue only a

state-created tort claim, and not the federal claims by reason of which the case was removed. Plaintiff did not, however, move to have the case remanded, and the court did not remand on its own motion. Following entry of a sizable judgment against the international union, it moved to have the judgment vacated and the case remanded for lack of subject matter jurisdiction. In holding that the remand order was reviewable notwithstanding §1447(d) because it was entered outside the time frame specified in §1447(c), the court reasoned:

> Because Congress has so firmly stated a general policy against appellate review of remand orders, we deem it advisable to consider the end sought to be achieved by that policy and the effect on that end of a holding that remand orders entered after final judgment are reviewable.
>
> The policy underlying §1447(d) identified by the court in *Thermtron* is the preclusion of delay in litigating the merits of a controversy that would attend appellate litigation of jurisdictional issues. 423 U.S. at 351, 96 S.Ct. at 593. In speaking of one of the predecessors of §1447(d) that repealed an earlier provision permitting review of remand orders in removed cases, the Court said:
>
> > Congress . . . established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.
>
> United States v. Rice, 327 U.S. 742, 751, 66 S.Ct. 835, 839, 90 L.Ed. 982 (1946).

> The considerations of prompt and efficient judicial resolution of substantive controversies that inform a rule of nonreviewability of remand orders issued before final judgment in a removed case do not apply with the same force to remand orders issued subsequent to entry of final judgment in a removed case.

(Footnotes omitted.) *Id.* at 1098-1099.

The holding and rationale of *Carter* should apply to the reviewability by mandamus of the District Court's order entered in the instant case. The Order of Remand was entered after judgment, and respondent Tarkanian has an injunction against petitioner. Review by mandamus of the remand order will not occasion any delay in litigating the merits of the controversy.

Because Judge Foley's remand order failed to invoke the grounds specified in §1447(c) and was entered outside the time frame prescribed in that statute, mandamus is the appropriate remedy to insure that petitioner's right to a federal forum is protected. See *Sheet Metal Workers*, 693 F.2d at 1002.

II. A WRIT OF MANDAMUS SHOULD ISSUE TO SET ASIDE THE ORDER FOR REMAND AND DIRECT THE COURT TO ASSUME JURISDICTION OVER THE CASE.

A. The Claim For Attorney's Fees Under §1988 Is A Separate And Independent Claim Which Permits Removal.

A request for attorneys' fees under §1988 is a separate and independent claim which permits removal. In a variety of contexts, federal courts have recognized that

a §1988 claim for attorneys' fees raises issues collateral to the underlying cause of action giving rise to the claim for fees, and requires an inquiry by the court separate from the decision on the merits of that other cause of action. See also, *White v. New Hampshire Department of Employment Security*, 455 U.S. 455, 451 (1982). In *Obin v. District No. 9, International Association of Machinists and Aerospace Workers*, 651 F.2d 574, 582 (8th Cir. 1981), the Eighth Circuit noted the distinction between an action and attorney's fees for prosecuting that action and concluded "that a motion for attorney's fees raises a collateral and independent claim, not an application for costs under Rule 54(d) or a matter integral to the merits of the action." See also, *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 694 (8th Cir. 1983); *Willie M. By Singer v. Hunt*, 564 F. Supp. 363, 366 (W.D. N.C. 1983); and *Young v. Powell*, 729 F.2d 563, 566 (8th Cir. 1984) ("a request for attorney's fees is not inherently or necessarily subsumed by a decision on the merits . . . the issue is uniquely separable from the cause of action to be proved at trial.").

In holding that an award of attorneys' fees under §1988 was proper where the parties had earlier settled the underlying §1983 claim a federal court in West Virginia reasoned that the claim for fees was sufficiently independent of the case in which the services were rendered to stand alone. *Hamilton v. Bruce*, 552 F.Supp. 649 651 (W.D.Va. 1982). The court further noted that the matter of the application for fees proceeds essentially on a basis that is independent of the case in chief under §1983, and the only part of the §1983 case that is important is whether the plaintiff prevailed, and not, for instance, how or why he prevailed. *Id.*

In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 66 (1980), the Supreme Court held that Title VII of the Civil Rights Act of 1964 authorizes a lawsuit solely to obtain an award of attorneys' fees for legal work done in a prior state or local proceeding. The Court later explained that its conclusion in *Carey* rested on the premise that a claimed entitlement to attorneys' fees is independent of the merits of an action brought under Title VII alleging discrimination, and therefore supports a separate suit. *White v. New Hampshire Department of Employment Security*, 455 U.S. at 451 n. 13. Subsequently, the District Court in *Moreno v. City and County of San Francisco*, 567 F.Supp. 458, 460 (N.D.Cal. 1983) followed the decision in *Carey* and awarded attorneys' fees under §1988 in a separate and independent action from the state court proceeding in which they were incurred.

Hence, claims for attorneys' fees under the various (and comparable) fee provisions of the civil rights laws, including §1988, are separate and independent from claims brought under those provisions of the laws which afford relief from alleged violations of a plaintiff's civil rights. When raised later in an action brought to redress purported constitutional infirmities, a claim for attorneys' fees under §1988 provides new grounds for removal to federal court.

B. The Petition For Removal Was Timely Filed After Proper Notice To Petitioner Of The Federal Claim Upon Which Removal Is Sought.

A petition for removal based on a pleading other than the original complaint is governed by 28 U.S.C. §1446(b):

> If the case stated by the initial pleading is not removable, a *petition for removal may be filed within thirty days after receipt by the defendant,* through service or otherwise, *of a copy of an amended pleading,* motion, order *or other paper* from which it may first be ascertained that the case is one which is or has become removable. [Emphasis added]

In the present case, the first pleading or "other paper" advising petitioner NCAA that respondent Tarkanian was seeking attorneys' fees pursuant to federal statute, 42 U.S.C. §1988, was a trial brief served on petitioner on June 22, 1984. Oral notice of the §1988 claim allegedly given by respondent Tarkanian on June 11, 1984, during opening argument, is insufficient notice under the statute and the case law applying it. It is indisputable that notice must be in writing, and must be served personally on the defendant. *Jong v. General Motors Corporation*, 359 F.Supp. 223 (N.D. Cal. 1973); *Bonnell v. Sea Board Air Line Railroad Co.*, 202 F.Supp. 53 (N.D.Fla. 1962); *Camden Industries v. Carpenter's Local Union No. 1688*, 246 F. Supp. 252 (D.N.H. 1965); *Gottlieb v. Firestone Steel Products Co.*, 524 F.Supp. 1137 (E.D. Pa. 1981). In *Gottlieb*, the court held that oral notice of federal claims during conversations between attorneys to a lawsuit was not adequate notice of a removable claim. Obviously, a defendant cannot remove an oral pleading.

Nor did respondent Tarkanian's second amended and supplemental complaint plead §1988 attorneys' fees. Respondent's second amended and supplemental complaint not only fails to mention §1988 or its companion statute, §1983, but fails to plead essential elements of either statute. The complaint does not allege that the NCAA acted

under color of state law or that it is a person. The complaint pleads only a cause of action under the Fourteenth Amendment to the United States Constitution, and nothing more.

Assuming *arguendo* the complaint is sufficient to permit recovery under §1988 (cf. *Alford v. City of Lubbock, Texas*, 484 F.Supp. 1001, 1008 (N.D. Tex. 1979), *affirmed in part and reversed in part on other grounds*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975, 72 L.Ed.2d 848, 102 S. Ct. 2239 (1982)), the complaint nonetheless cannot constitute a sufficient notice to petitioner that recovery is sought under §1988 so as to start the thirty day period running for removal on that ground. The ground on which removal is sought must appear from the face of the pleading in which it is allegedly found. *Gully v. First National Bank in Meridian*, 299 U.S. 109, 57 S. Ct. 96, 81 L.Ed. 70 (1936); *Tennessee v. Union & Planter's Bank*, 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed. 511 (1894). In *Gully*, the Supreme Court remanded an action to the state court from which it had been removed because the federal action did not appear on the face of the petition. Under this "well-pleaded complaint" rule, a defendant is prevented from removing a case when the complaint does not *on its face* set forth grounds for federal subject-matter jurisdiction. Similarly, notice of a federal claim necessarily occurs only when a pleading or "other paper" makes the federal action "well-pleaded." To hold otherwise would allow a plaintiff to disguise a federal claim through the minimal requirements of notice pleading, then ambush a defendant later (and thereby circumvent removal) by contending that he should have known it was a federal claim all along. The plaintiff cannot have it both ways.

The first pleading or other paper in the instant case sufficiently well-pleaded to give petitioner notice under §1446(b) that a claim was asserted under §1988 was respondent Tarkanian's trial brief served on petitioner on June 22, 1984. Therefore, petitioner's removal to federal District Court on July 17, 1984 was timely.

III. UNLV AND THE BOARD OF REGENTS SHOULD BE REALIGNED WITH PLAINTIFF FOR PURPOSES OF REMOVAL JURISDICTION

Respondent Tarkanian contended below that remand was proper because the other named defendants (hereinafter referred to collectively as "UNLV") failed to join in the petition for removal. In light of the findings and conclusions of Judge Goldman and the evidence presented at trial, as reflected in the transcript thereof, it is apparent that respondent Tarkanian's complaint is against petitioner only, and the University and Board of Regents should be aligned with Tarkanian for removal purposes.

It is well-settled that a federal court may realign the parties to a lawsuit after removal from state court. *Meyer v. Delaware R.R. Construction Co.*, 100 U.S. 456, 25 L.Ed. 593 (1879). The proper objective of realignment is to arrange the parties so that the necessary "collision of interests" exists between them. *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 86 L.Ed. 47 (1941); 3A Moore's Federal Practice ¶2147-8. In determining whether this "collision of interests" exists, the court must look beyond the pleadings, and arrange the parties according to their real interests in the dispute. *City of Indianapolis v. Chase National Bank, supra*, 314 U.S. at 69; *Eikel v. States Marine Lines Inc.*, 473 F.2d 959, 963 (5th Cir. 1973); *Meyer v. Delaware R.R. Construction Co.*, 100 U.S. 456, 25 L.Ed. 593 (1879).

Determining the true interests of respondents UNLV and the Board of Regents in this litigation is a subjective, not objective, test. There are no mechanical rules. As the Supreme Court stated in *City of Indianapolis v. Chase National Bank, supra,* 314 U.S. at 69:

> Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary "collision of interests" . . . exists, is therefore not to be determined by mechanical rules. It must be ascertained from the "principal purpose of the suit," . . . [citations omitted]

In determining the true interests of the parties to this action, the case law encourages the Court to review the record of the proceedings before Judge Goldman. In *Niles-Bement-Pond Company v. Iron Moulders Union,* 245 U.S. 77, 65 L.Ed. 145, 41 S. Ct. 39 (1920), it was held that the District Court, in determining whether to realign a party, must perform its own "scrutiny of the record" to determine whether the interests of the plaintiff and a defendant are truly adverse. In *Meyer v. Delaware R.R. Construction Co.,* 100 U.S. 456, 25 L.Ed. 593 (1879), the High Court also emphasized the importance of the federal court's review of the facts to determine the true interests of the parties on removal.

> For the purposes of a removal the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute . . . . Under the old law the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit. . . . Under the new law the mere form of the pleadings

> may be put aside, and *the parties placed on different sides of the matter in dispute according to the facts.* This being done, when all those on one side desire a removal, it may be had, if the necessary citizenship exists.

Meyer, 100 U.S. at 468-9 (emphasis added).

The true interests of respondent UNLV and the Board of Regents in this case lie with respondent Tarkanian. Both parties have but one goal: to prevent respondent Tarkanian's suspension from coaching basketball at UNLV. The transcript of the trial proceedings, which will be completed soon, and Judge Goldman's findings and conclusions clearly show this unity of interest. This fact is also evident in the decision of respondents UNLV and the Board of Regents not to appeal Judge Goldman's order. UNLV and the Board are fully aware that the injunction entered by Judge Goldman, unless appealed by them, may effectively block the suspension of respondent Tarkanian, regardless of any further action taken by the NCAA.

Numerous cases have held that antagonism between parties is a relevant consideration in determining the property of realignment, and a failure or refusal of a party to participate in litigation may be viewed as antagonistic. *Lewis v. Odell,* 503 F.2d 445 (2d Cir. 1974); *Smith v. Sperling,* 354 U.S. 91, 1 L.Ed. 1205 (1957); *Reed v. Robilio,* 376 F.2d 392 (6th Cir. 1967); *Hirsch v. Stone,* 62 F.2d 120 (5th Cir. 1932). In *Smith v. Sperling,* a shareholder derivative suit, the Court refused to realign the defendant corporation with plaintiff shareholders, citing antagonism between the plaintiffs and the corporation, as evidenced by the corporation's refusal to file the suit in the first instance. The Court stated, 354 U.S. at 96-97:

The management may refuse or fail to act for any number of reasons. Fraud may be one; the reluctance to take action against a close business associate may be another; honest belief in the wisdom of the course of action which the management has approved may be still another; and so on . . . . "The attitude of the directors need not be sinister. It may be sincere." *Whenever the management refuses to take action to undo a business transaction* or whenever, as in this case, it so solidly approves it that any demand to rescind would be futile, antagonism is evident. The cause of action, to be sure, is that of its corporation. But the corporation has become through its managers hostile and antagonistic to the enforcement of the claim. [Emphasis added and citations omitted]

Nor is the realignment of a party for failure to take action limited to shareholder derivative suits. In *Hirsch v. Stone,* 62 F.2d 120 (5th Cir. 1932), a trustee, who refused to foreclose a deed of trust upon default in payment by the makers of a promissory note, was joined as a defendant by the holders of the note. The Appellate Court refused to realign the trustee with the plaintiffs, citing the trustee's refusal to sue the defaulting parties as evidence of antagonism toward the plaintiffs. The Court stated, 62 F.2d at 122:

> [T]hough jurisdiction cannot be conferred by the collusive, colorable refusal of a trustee with title to sue . . . neither can it be defeated by realigning with plaintiffs a trustee sued as defendant, who though he should be on the same side with plaintiffs, has taken a position antagonistic to them, and has refused to act in their behalf.

Although respondents UNLV and the Board of Regents were named as defendants in this lawsuit, in truth and in fact their interests lie with respondent Tarkanian, and against the petitioner NCAA. The transcript of trial proceedings, as well as Judge Goldman's findings and conclusions, show their interests are one: to prevent respondent Tarkanian's temporary suspension from coaching basketball at the University of Nevada-Las Vegas. This fact is also evident in the decision of UNLV and the Board of Regents not to appeal Judge Goldman's findings. UNLV and the Board are fully aware that the injunction presently against them, unless appealed, may effectively block the temporary suspension of Tarkanian, regardless of any action taken by the NCAA.

CONCLUSION

The District Court, in ordering remand of this action, exceeded its authority and acted without jurisdiction. Petitioner's right to remove was predicated on two grounds: (1) assertion against it of a new, separate and independent claim, and (2) realightment of its "co-defendants," based on antagonism that surfaced during trial.

Respondent Tarkanian filed in the District Court a Motion to Strike the removal petition, which in respondent's accustomed fashion, seemed more concerned with hurling unsupported digs at petitioner than with addressing the issues. Interestingly, respondent's motion did not dispute the factual basis of petitioner's second ground, but instead attacked with fallacious principles petitioner's legal basis for realignment.

Particularly with respect to the latter ground for removal, petitioner felt that a copy of the trial transcript would lend assistance both to it in making and substantiating its arguments in response to the motion to strike,

and to the District Court in fully appreciating petitioner's grounds. The District Court granted petitioner's first request for extension of time to obtain the transcript, but then when, for reasons beyond petitioner's control, the transcript could not be completed within the time allotted and petitioner requested a second extension, the District Court entered its Order for Remand. No ruling was issued on petitioner's second request for extension, and petitioner was denied the opportunity to respond fully to the Motion to Strike.

The District Court's order is subject to review by way of a petition for writ of mandamus. In the first place, the reasons assigned for remand fall outside the reasons authorized under 28 U.S.C. §1447(c). Additionally, the order of remand was issued after final judgment. Hence, the proscriptions on review found in §1447(d) do not apply and the order should be scrutinized by this Court. In considering the aptness of mandamus, petitioner wishes to reemphasize that review will not delay a decision on the merits (as one has been rendered), but instead, issuance of the writ is necessary and appropriate in aid of the Court's jurisdiction. 28 U.S.C. §1651.

For the foregoing reasons, petitioner respectfully requests that the Court determine that jurisdiction of this action lies in federal court, and issue a writ of mandamus ordering the United States District Court for the District of Nevada to assume jurisdiction and entertain this action.

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By: /s/ Kristina M. Hanson
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Attorneys for the National
Collegiate Athletic Association

DOCUMENT M

(Filed March 5, 1985)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2273
DC# CV-84-460 RDF
Nevada (Las Vegas)

JERRY TARKANIAN,
Plaintiff-Appellee,

vs.

UNIVERSITY OF NEVADA, et al.,
Defendants,

and

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant.

ORDER

Before: FARRIS, CANBY and REINHARDT, Circuit Judges

The National Collegiate Athletic Association appeals a judgment rendered against it in Nevada state court. The state court judgment was removed to federal court by the NCAA on the ground that plaintiff's claim for attorney fees under 42 U.S.C. § 1983 raised a new federal cause of action. The claim for attorney fees was the sole basis for removal asserted by the NCAA. A notice of appeal from the state court judgment was filed in

district court by the NCAA before the district court had the opportunity to review the propriety of removal.

The court notes that the removal of this action to federal court was improvident. A request for attorney fees under § 1988 does not present a new or separate ground for removal where, as here, the complaint expressly alleges a violation of Fourteenth Amendment rights.

Accordingly, we remand this action to the district court with directions that the case be remanded to the Nevada state court from which it was removed.

MoCal 2/21/85

DOCUMENT N

(Filed August 25, 1985)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-7825
DC# 460 RDF
Nevada (Las Vegas)

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,
Respondent,

and

UNIVERSITY OF NEVADA, JERRY TARKANIAN, et al.,
Real Parties in Interest.

ORDER

Before: FARRIS, CANBY and REINHARDT, Circuit Judges

The petition for a writ of mandamus is denied.

DOCUMENT O

August 30, 1977

CONFIDENTIAL

Mr. Jerry Tarkanian
c/o Samuel S. Lionel, Esq.
Lionel, Sawyer & Collins
300 South Fourth Street, #1700
Las Vegas, Nevada 89101

Dear Mr. Tarkanian:

As you are probably aware, the University of Nevada, Las Vegas has recently completed its hearings before the NCAA Committee on Infractions and Council. As a result of those hearings, the Committee on Infractions and the Council have concluded that certain infractions of NCAA rules took place, in which you were purportedly involved.

Attached please find a summary of the NCAA's determination of your involvement in this matter.

The University has been advised by the NCAA to sever you from any involvement with the University's athletic program during the University's probationary period, which is two years, or show cause to the NCAA why it should not suffer additional penalty for not having taken that action. Basically, severence from the athletic program means that you would be prevented from 1) donating money to the University's athletic program; 2) becoming a member or maintaining membership in any University athletic booster club; 3) being involved either formally or informally in recruiting of student-athletes

for the University; or 4) any other involvement, formal or informal, with the University's athletic program.

The University has scheduled a hearing on your behalf before a University hearing officer at which time you may submit information and argument to the hearing officer if you wish to contest your being severed from the athletic program. The University will have the proceedings recorded and you will be able to obtain a transcript thereof for normal transcription and reproduction costs. In addition, you will be allowed representation by an attorney if you desire, and may have witnesses testify on your behalf within reasonable time constraints. At the time set for your hearing, University legal counsel will present the information relied upon by the NCAA to arrive at its recommendation to sever you from the University's athletic program.

The hearings will be held in the office of the President, 7th Floor Humanities Building, UNLV Campus, Las Vegas, Nevada. Your hearing has been scheduled for 10:00 a.m. on Tuesday, the 6th day of September, 1977. Please notify this office (739-3201) if you do not wish to contest the proposed severence action or if you wish to either waive or reschedule your hearing. IN ANY EVENT, UNLESS YOUR HEARING IS RESCHEDULED, YOUR FAILURE TO APPEAR ON THAT DATE AND TIME NOTED SHALL CONSTITUTE A WAIVER OF YOUR HEARING RIGHTS AND A CONSENT TO SEVERENCE ACTION BY THE UNIVERSITY.

Sincerely,
/s/ Donald H. Baepler
Donald H. Baepler
President

HAND DELIVERED

DOCUMENT P

September 7, 1977

Mr. Jerry Tarkanian
Head Basketball Coach
University of Nevada, Las Vegas
Las Vegas, Nevada

Dear Jerry:

Dr. Brock Dixon, who was appointed by me to conduct your University hearing after the NCAA Council appeal, has submitted his decision to me. A copy of that decision is enclosed with this letter. I think you will find that Brock's dilemma and that of the University is well set out in the decision.

In addition, you should be aware of recent actions that the University has taken in attempting to resolve this matter. Notably, Bill Ireland and I spoke with the NCAA Committee on Infractions and Bill Hunt by conference telephone call yesterday. Despite discussion of virtually every alternative to your suspension that the University had considered and even discussion of NCAA staff suggestions on other proposals, the Committee on Infractions rejected any and all alternatives. As a result, I feel it would be impossible for the University to show cause why additional penalty should not be imposed if the University fails to take the action dictated by the Committee, and the University is simply left without alternatives.

It is, therefore, my unpleasant task to inform you that, effective 5:00 p.m., Friday, September 9, 1977, you shall be completely severed of any and all relations, formal or informal, with the University's Intercollegiate athletic program during the period of the University's NCAA

probation. Such relations shall include, but not be limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups, and public relations or fund-raising activities related to the University's athletic program.

Please contact my office Monday morning, September 12, 1977, for an appointment in order that we might discuss your future employment duties with the University.

Sincerely,

/s/ Donald H. Baepler
Donald H. Baepler
President

cc: Mr. Samuel Lionel

DOCUMENT Q

September 6, 1977

MEMORANDUM

TO: Donald H. Baepler
President

FROM: Brock Dixon

Acting under the authority of your memorandum of August 31, 1977, at 10 a.m. this morning, I convened a hearing on the matter of NCAA sanctions as they apply to the continued association of Coach Tarkanian with the athletic program. Present were: Coach Tarkanian, Mr. Seidman representing the University's position, Mr. Sam Lionel assisted by Mr. Mark Solomon representing Coach Tarkanian. For two hours and fifteen minutes I heard evidence on the substance of the NCAA charges, Mr. Seidman ably and vigorously presenting them and Mr. Lionel just as ably and vigorously contesting them. From 12:15 p.m. to 12:45 p.m. I heard arguments dealing with the justification for the sanctions and their appropriateness and on the position the University ought to take with respect to them. Obviously, one could not in the course of three hours hear a recapitulation of all the evidence or all of the arguments which have hitherto been advanced in this matter but with the assistance of two well-prepared contending attorneys I think I can claim to have reheard enough things to justify this memorandum of findings and recommendations.

The factual basis for the NCAA's charges and sanctions as they apply to Coach Tarkanian is clearly in doubt. The University has been contending for months that the

NCAA's investigators were biased and frequently in error. In almost every factual situation delineated by the NCAA, the University's own investigation has been able to find a substantial body of conflicting evidence, some of which has been heard and considered by the NCAA and some of which has been brushed aside. Much of the NCAA case rests on what are reported to be initial statements by Robert (Jeep) Kelley. Much of Mr. Tarkanian's case has rested on evidence that the "initial statements" were not so much Kelley's as Coach Morroco's. In several instances the NCAA was given complete and to me convincing evidence that Coach Tarkanian had not done things that he has been alleged to have done.

Most serious is the charge that Coach Tarkanian attempted to frustrate the NCAA's application of the rules by getting people to "change their story" or to fabricate bodies of countervailing evidence. I am not convinced that the NCAA investigation adequately supports this charge and yet we must remember that the NCAA infractions committee and the NCAA Council, both composed of distinguished scholars, administrators, and lawyers, believed otherwise. Some of the NCAA arguments are absurd, e.g., that Kelley feared harm if he co-operated with the NCAA. What kind of harm? During the time when Kelley had little success on the court and no more in the classroom and thereafter, Tarkanian was supportive and helpful but, I think, no more so than any proper coach would be with respect to students in similar difficulties.

The NCAA authorities chose to believe that the University countered the investigation by attacking the staff. One cannot discount the belief of honorable committees and councils in their tried and proven staff members.

Neither can one accept at face value the results of investigations which show a man like Kelley at a wrong address when the question of where he lived is really at issue. One is forced to wonder why an investigator, in this case Mr. Berst, would tell his governing authorities that Kelley called him when Kelley was in fact returning Berst's own call. Mr. Lionel made the point that years of investigating experience may result in a zeal which dulls the ethics of objectivity. Mr. Seidman just as credibly argued that years of investigating experience may hone the search for truth to a sharp edge. I conclude that the motives and methods of investigators are not above challenge and in this case the methods at least were remarkably slipshod yielding bad addresses, bad dates, doubtful attributions and some inaccuracies that are gross indeed. This leads me to the Harvey Munford grade case.

Investigator McMenamin came upon a story that a basketball player named Mr. David Vaughn got a grade in a university course taught by Mr. Munford with a prior agreement that he would not have to appear or do any work. Other students including a student who was paid for typing his term paper and others who recognized this basketball player by his size, say it did not happen. Mr. Munford's attorney arranged to subject him to a professional polygraph examination which indicated that Munford's denial of the accusation was true. In this narrow instance I conclude that *good* investigation would have dug up some of the denials along with the original story, and this conclusion was strongly reinforced by a later separate hearing devoted entirely to NCAA sanctions as they affect Mr. Munford.

If one believes all or substantially all of the charges and allegations it may follow as the NCAA Council asserts that Coaches Bayer and Tarkanian "knowingly and willfully" tried to operate the basketball program in violation of NCAA rules and in that case there must have been failure of one or both to report offenses against those rules and participation by one or both in certification of compliance which were not true. The NCAA authorities believed enough of the allegations to activate the domino effect which validates these last points.

I turn now to the arguments concerning the proposed sanctions. It is clear that to the extent that the University ignores them it invites reconsideration by NCAA authorities and one must believe that they will impose heavier and not lighter penalties. Accordingly, our action or non-action with respect to the proposed sanctions is consequential indeed. If we do not implement them we invite heavier penalties and if we do we are asked among other things to disassociate from his professional duties without normal notice a tenured member of the professional staff.

Mr. Seidman argues persuasively that by joining the NCAA we delegated to that organization the establishment of governing standards and their enforcement as well. We are allowed and encouraged to make our own investigations but this is in no way a substitute for the investigative functions of the NCAA itself. We must live by our commitments to the NCAA, its standards and its machinery. We must accept their findings of fact as in some way superior to our own and, if we do not like the way the NCAA works, our remedy is to work for reform within the organization. In this instance we could

wish for standards and due process and evidence far superior to that which we have observed, but given the terms of our adherence to the NCAA we cannot substitute —biased as we must be—our own judgment on the credibility of witnesses for that of the infractions committee and the Council. Mr. Seidman further argues that no one could be a better judge of the appropriateness of sanctions to circumstances than the NCAA governing bodies which make all of the investigations and impose all of the sanctions. Appropriateness is to be judged largely in terms of what has happened to other schools in roughly similar positions and we cannot substitute our judgment for the NCAA's on this point.

Mr. Lionel agrees that the University did delegate to the NCAA along the lines argued by Mr. Seidman. He goes on to say that there must be limits on the breadth of this delegation and that the University must never have intended to delegate the power to punish without even minimum respect to due process. He argues that there was not a minimum of respect for Mr. Tarkanian's or the University's rights, pointing out that the University was never able to get any guidelines on preparing its appeal or any indication of how appeals might be handled, that the NCAA never investigated Mr. Berst's motives even after we questioned them, that we did not know the source of the original allegations until a formal hearing stage had been reached, that Coach Tarkanian was never given an opportunity to confront or cross-examine, that the University was never able to get a transcript of hearings for study, and finally, that the NCAA Council made its findings and affirmation without ever having had an opportunity to see the transcripts of earlier hearings. Mr. Lionel argued that for the Univer-

sity to impose a sanction under these circumstances is to become a party to a grave injustice.

I find:

1. That the NCAA's delegation by the terms of our adherence is as broad as Mr. Seidman argues.
2. That in this instance the NCAA's standards of proof and due process were inferior to what we might reasonably expect of any organization to which we belong and that institutionally we must work for a reform of the NCAA in these respects. (I agree that the NCAA is a proper judge of the appropriateness of certain sanctions to certain kinds of offenses.)

Here are alternatives:

1. Reject the sanction requiring us to disassociate Coach Tarkanian from the athletic program and take the risk of still heavier sanctions, e.g., possible extra years of probation.
2. Recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position—though tenured and without adequate notice—even while believing that the NCAA was wrong.
3. Pull out of the NCAA completely on the grounds that you will not execute what you hold to be their unjust judgments.

I recommend that you execute the proposed sanctions of the NCAA as they apply to Coach Tarkanian.

DOCUMENT R

CONFIDENTIAL REPORT NO. 123 (47)

By the NCAA Committee on Infractions

to the

NCAA COUNCIL

Case No. 443 - University of Nevada, Las Vegas

This report is filed in accordance with Section 6 of the Official Procedure Governing the NCAA Enforcement Program, and is organized in five sections, as follows:

I. Violations of NCAA requirements or questionable practices in light of NCAA requirements, as determined by Committee.

II. Penalty to be imposed upon institution, as proposed by Committee.

III. Origin of case.

IV. Related factors appropriate for consideration in judgment of case.

V. Disciplinary or corrective actions taken by institution or conference, or any other agency involved in particular incident.

Pursuant to the appeal initiated by the University of Nevada, Las Vegas, under Section 5 of the Official Procedure Governing the NCAA Enforcement Program, the Committee on Infractions will submit Report No. 123(47) to the Council of the National Collegiate Athletic Association at its meeting in Knoxville, Tennessee, August 22, 1977.

Case No. 443

[University of Nevada, Las Vegas]

[NOTE: The NCAA MANUAL citations in this report are from the 1976-77 NCAA MANUAL which was in effect at the time the Committee on Infractions' initial Confidential Report No. 123 (47) was forwarded to the University of Nevada, Las Vegas. Each finding of violation appealed by the University of Nevada, Las Vegas, is identified by an asterisk (*). Information submitted by the Committee on Infractions related to each appealed finding of violation directly follows the finding and is separated by a line.]

I. Violations of NCAA requirements or questionable practices in light of NCAA requirements, as determined by Committee.

A. Violations of the principles governing expenses, extra benefits and financial aid to student-athletes [NCAA Constitution 3-1-(g)-(5), 3-1-(g)-(6) and 3-4-(a)].

1. During the 1971-72 academic year, then head basketball coach John Bayer arranged for student-athlete Dan Cunningham to be provided the benefit of round-trip commercial airline transportation at no cost to Cunningham between Las Vegas, Nevada, and his home in Salinas, California, in order for the young man to return home for Christmas vacation.

*2. In November 1973, through the arrangements of head basketball coach Jerry Tarkanian and Frank Denton, a representative of the

University's athletic interests and operator of the American Tour and Travel Service, Las Vegas, Nevada, student-athlete Robert "Jeep" Kelley was provided one-way airline transportation at no charge to Kelley from Las Vegas, Nevada, to his home in Pittsburgh, Pennsylvania; further, at the time the young man returned to the University, Tarkanian reimbursed Kelley in cash for the cost of one-way commercial airline transportation from Pittsburgh to Las Vegas.

The Committee's finding is based upon information reported to the NCAA by Robert Kelley on May 15, 1975. It should be noted that the University does not dispute that Kelley traveled from Las Vegas to Pittsburgh in November 1973, and returned to Las Vegas after remaining in Pittsburgh for several days. Further, there is no dispute that the cost of the return trip to Las Vegas was initially paid through the arrangements of Kelley's former high school principal, James Robinson.

However, based primarily upon information developed by the institution in its review of this allegation with Jerry Tarkanian and Kelley, the University denies that the initial trip was arranged by Jerry Tarkanian and Frank Denton, and denies that Tarkanian reimbursed Kelley for the costs incurred to return to Las Vegas. After reviewing all the information reported in this case, the

Committee has concluded that Kelley provided the NCAA accurate information during his initial May 15, 1975, interview even though information he later reported to the University was substantially different. Basically, the Committee believes that Kelley was improperly encouraged and pressured to provide the University false information during its investigation of this matter as described by the young man and his aunt, Frances Parker, in Part I-F-1 of this report. Also, no information has been reported to the Committee which would satisfactorily explain why Kelley would report false information to the NCAA during his initial May 15, 1975, interview.

It should be noted the University has charged that the information upon which the Committee bases its conclusion was never reported to the NCAA by Kelley. The Committee has carefully considered this question as described in Part IV-E of this report. In addition, please note Part IV-C of this report further explains the Committee's thinking with regard to the University's investigation of allegations involving Kelley.

The University has indicated it does not believe Denton should be considered a representative of the University's athletic interests. In this regard, the Committee notes that in correspondence exchanged between Denton and Tarkanian during the summer 1973, Denton offered to arrange cost-free, personal

air travel for Jerry Tarkanian, his family, assistant coaches, friends and athletes on "junket" flights. It should also be noted that Tarkanian did not decline this offer of assistance from Denton for members of the University's basketball team, and actually identified Kelley as an individual who could benefit from this service. As the Committee and Council have found in numerous cases in the past, when an individual becomes associated with the promotion of an institution's intercollegiate athletic program (i.e., by contacting a member of the University's coaching staff to offer assistance to student-athletes) such an individual is considered to be a representative of the University's athletic interests, and the University becomes responsible for his actions to assist student-athletes. Further, the Committee believes the University is well aware of its responsibility in this regard, and notes that Tarkanian wrote a June 11, 1973, letter to Denton describing the application of NCAA regulations to Denton's offer of assistance.

*3. During the 1973-74 academic year, head basketball coach Jerry Tarkanian provided student-athlete Robert "Jeep" Kelley the name and telephone number of Frank Denton, a representative of the University's athletic interests and operator of the American Tour and Travel Service, Las Vegas, for the purpose of assisting Kelley in obtaining personal airline transportation at no cost to him; fur-

ther, after Kelley followed Tarkanian's instructions, Denton actually arranged for the young man to receive the benefit of round-trip airline transportation at no cost to Kelley between Las Vegas and Pittsburgh at the time he visited his home at the conclusion of the 1973-74 basketball season and again during August or September 1974, prior to the start of classes for the 1974-75 academic year.

The Committee's finding is based upon information provided to the NCAA by Robert Kelley on May 15, 1975. It was noted that in reporting this information, Kelley not only identified Frank Denton as the individual arranging this transportation but also recalled the telephone number of Denton's place of business, American Tour and Travel Service. The Committee believes it is unlikely Kelley would have recalled this number unless he had occasion to utilize Denton's services as described. The University bases its position primarily upon information developed during its interviews with Tarkanian, Denton and Kelley. In this regard, the Committee again directs the Council's attention to Parts I-F-1, IV-C and IV-E of this report for additional information concerning the Committee's position in regard to allegations involving Kelley.

The Committee believes Denton is a representative of the University's athletic interests

for the reasons set forth in Part I-A-2 of this report. In addition, the Committee asks the Council to note that in regard to this finding, Kelley would not have been in a position to receive the benefit of cost-free airline transportation without the assistance of Tarkanian in contacting Denton, thereby establishing a relationship between Denton and the University's basketball coaching staff which led directly to the violation in question.

It should be noted the Committee does not accept the University's contention that the benefit of cost-free airline transportation on "junket" flights is available to *all* members of the University's student body in general. Rather, information reported to the Committee indicates that this benefit is limited to individuals satisfying certain conditions established by the operators of such flights. Such conditions include a personal interview to insure the flight is a matter of necessity and not pleasure, receipt of a request from a friend of the junket operator, or a specific offer of assistance to seleceted individuals by the junket operator. Information has not been reported to establish that *all* students enrolled in the University who desire to travel are permitted to take advantage of this benefit at the discretion of the student. In fact, Denton's June 6, 1973, letter to Tarkanian offers this service only to Jerry Tarkanian, his family, assistant coaches, friends and athletes.

*4. Through the arrangements of Frank Denton, a representative of the University's athletic interests and operator of the American Tour and Travel Service, Las Vegas, Nevada, student-athlete Ricky Sobers received the benefit of personal airline transportation at no cost to him between Las Vegas and his home in New York on at least one occasion during his attendance at the University (1973-74 and 1974-75 academic years).

The finding is based upon information initially reported to the NCAA by Ricky Sobers on August 14, 1975.

The University contends that although Sobers received the benefit of cost-free transportation on one occasion, it was not through Denton's arrangements. In considering this matter, the Committee was unable to determine why Sobers would initially report to the NCAA that Denton arranged the transportation in question if, in fact, he did not. To review additional information concerning the reasons the Committee accepts Sobers' initial report to the NCAA, rather than the change in detail related to Denton's involvement which was developed in the University's interview with Sobers, the Council's attention is directed to Part IV-C of this report. Further, the Committee believes Denton is a representative of the University's athletic interests for the reasons cited in Part I-A-2 of this report. The Committee also notes that

in Tarkanian's June 11, 1973, letter to Denton, Sobers is identified as an individual who could benefit from Denton's services.

B. Violation of the principles governing extra benefits to student-athletes [NCAA Constitution 3-1-(g)-(6)].

*1. During the 1972-73 academic year, then head basketball coach John Bayer arranged for student-athletes Pat Bolster and Dan Cunningham to be provided entertainment at one or more dinner shows featuring Buddy Hackett and Charo at the Sands Hotel in Las Vegas at no cost to the young men; further, on one occasion, Bolster's parents accompanied the young men at no charge to them.

The Committee's finding is based upon information reported to the NCAA by Dan Cunningham on January 18, 1974, as well as by Pat Bolster on March 8, 1976. The University agrees that Bayer made reservations on at least one occasion for these young men but indicates that Bayer was unaware the young men would not be required to pay the costs associated with this entertainment. The Committee believes it is unlikely that the young men would have found it necessary to ask Bayer to make these reservations in this instance unless they expected to receive a special benefit. Further, Cunningham confirmed to the NCAA that he never expected to pay the costs associated with this entertainment.

C. Violations of the principles governing extra benefits and financial aid to student-athletes [NCAA Constitution 3-1-(g)-(6) and 3-4-(a)].

1. During the 1971-72 and 1972-73 academic years, then head basketball coach John Bayer gave student-athlete Dan Cunningham a monthly cash allowance of approximately $100, which was not administered by the University's regular scholarship awards authority, in addition to a full institutional grant-in-aid which Cunningham already was receiving.

*2. During the 1971-72 and 1972-73 academic years, then head basketball coach John Bayer gave student-athlete James Baker a monthly cash allowance of approximately $50, which was not administered by the University's regular scholarship awards authority, in addition to a full institutional grant-in-aid which Baker was already receiving.

The Committee's finding is based on information reported by John Bayer to the NCAA on April 3, 1974. On that occasion, Bayer described in detail negotiations he conducted with Baker when the young man threatened to transfer from the University unless he was provided a cash allowance; further, Bayer reported that these negotiations resulted in the provision of a cash allowance of $50 per month to Baker. It should be noted that student-athlete James Baker refused to be interviewed by the NCAA in this case, although he has stated to the University that this information is false. Also, Bayer later denied to the University that he provided this allowance to Baker. The Committee believes that Bayer reported accurate information in his first interview with the NCAA based on his recollection of specific details related to negotiations resulting in the provision of this allowance to Baker. The Committee notes that during the period of time in question, Bayer was providing $100 cash per month to another student-athlete as set forth in Part I-C-1 of this report.

*3. During the 1972-73 academic year, student-athlete James Baker was provided the use of a 1973 Ford Thunderbird automobile at no cost to the young man; further, the automobile was obtained by the young man from the Sam Krug Chrysler-Plymouth agency which was owned by Sam Krug and Art Thomas, representatives of the University's athletic interests.

After reconsideration of this finding in light of the University's appeal, the Committee agrees that there is not sufficient information to warrant a finding in this instance. Accordingly, the Committee withdraws this finding and requests the Council to delete it from this report.

In the Committee's judgment, the deletion of this finding should not affect the proposed

penalty in this case, other than to remove the names of Sam Krug and Art Thomas from the list of representatives of the University's athletic interests to be severed from the institution's intercollegiate athletic program as set forth in Part II-F-3 of this report.

*4. During the 1971-72 and 1972-73 academic years, then head basketball coach John Bayer and Richard Davis, Fair and Davis Real Estate Company and a representative of the University's athletic interests, arranged for selected members of the University's intercollegiate basketball team to reside in the Flamingo East Apartments, Las Vegas, Nevada, at no cost to the young men; further, each of the student-athletes continued to receive a full athletic grant-in-aid at the University, including a room allowance while residing cost free in these apartments; finally, among the student-athletes who have enjoyed this benefit during their attendance at the University are James Baker, Don Weimer, Eddie Taylor and Dan Cunningham.

This finding is based primarily upon information reported to the NCAA on December 16, 1975, by Noel Pion, former manager of the Flamingo East Apartments. Pion reported that Richard Davis agreed to provide former head basketball coach John Bayer an apartment on a cost-free basis. Bayer then made this apartment available to selected

student-athletes on a rent-free basis. Pion reported that student-athletes James Baker, Dan Cunningham, Eddie Taylor and Don Weimer resided in this apartment at no personal expense through these arrangements. The University acknowledges that at least three of the student-athletes in question (Baker, Taylor and Weimer) did, in fact, reside at the Flamingo East Apartments for a period of time, but has appealed this finding based on information developed in interviews with the young men and Richard Davis. To review additional information concerning the reasons the Committee accepts the information provided by Pion as opposed to that reported by the former student-athletes in question and Davis, the Council's attention is directed to Part IV-C of this report.

The Committee has identified Davis as a representative of the University's athletic interests based on the fact that he has made available an apartment to the University's athletic department for several years to house coaches visiting Las Vegas, and because he is a former secretary-treasurer of the University's athletic booster club.

*5. During a portion of the 1973-74 and 1974-75 academic years, Mr. and Mrs. Burrell Cohen, representatives of the University's athletic interests, permitted student-athlete Robert "Jeep" Kelley to reside cost free in their home in Las Vegas.

The Committee's finding is based upon information reported to the NCAA by Robert Kelley initially on May 15, 1975, and again on March 5, 1976. Kelley initially indicated in 1975 he resided cost free in the Cohen home as described in this finding. On March 5, 1976, Kelley reported to the NCAA that the Cohens had contacted him to request that he report to the NCAA that he paid $70 rent per month during the period he resided in the Cohen home. The Committee notes that this request was made after Mr. and Mrs. Cohen's January 15, 1976, interview with an NCAA enforcement representative, at which time the Cohens reported that Kelley had paid $75 per month for rent. It is the Committee's belief that Cohen requested Kelley to report inaccurate information in order to corroborate the false information the Cohens already had provided the NCAA. The Committee also directs the Council's attention to Parts I-F-1, IV-C and IV-E of this report which present additional information concerning the Committee's position in regard to allegations involving Kelley.

It should be noted that during the summer 1973, Cohen wrote Jerry Tarkanian to advise him of plans to assist Kelley in adjusting to college life. In addition, Cohen contacted Tarkanian at the time Kelley established residence in the Cohen home and discussed

the arrangements for the young man's lodging. It is the Committee's position that these actions establish Cohen and his wife (who was also involved in these arrangements) as representatives of the University's athletic interests for purposes of applying NCAA regulations.

*6. During the 1973-74 academic year, head basketball coach Jerry Tarkanian arranged for student-athlete Robert "Jeep" Kelley to be given a shirt and two pairs of slacks at no cost to the young man by a salesman at a Mr. Slacks clothing store, Las Vegas, Nevada.

The Committee's finding is based upon information reported to the NCAA by Robert Kelley on May 15, 1975. Kelley stated that he obtained the shirt and slacks through the arrangements of Tarkanian as found by the Committee.

The University's appeal is based primarily on information developed during its interviews with Kelley. As previously noted, the Committee believes that after Kelley provided information to the NCAA related to this and other findings, he was improperly encouraged and pressured to provide the University false information. In this regard, the Committee again directs the Council's attention to Parts I-F-1, IV-C and IV-E of this report.

*7. On one occasion during the 1973-74 or 1974-75 academic year, student-athlete Ricky

Sobers was given a suede jacket, a pair of slacks and at least two shirts by a salesman at a Mr. Slacks clothing store, Las Vegas, Nevada.

The Committee's finding is based upon information reported to the NCAA by Ricky Sobers on August 14, 1975. Sobers reported he was given these items of clothing by a salesman at the identified clothing store in recognition of two victories by the University's intercollegiate basketball team. Although substantially different information was developed by the University during its interview with Sobers, the Committee was unable to determine why Sobers would initially report this information to the NCAA if, in fact, it was not true. For additional information concerning the reasons the Committee accepts the information initially reported by Sobers, the Council's attention is directed to Part IV-C of this report.

It should be noted that the Committee did not consider this finding in determining an institutional penalty in this case. Although it is clear in the Committee's opinion that this clothing was provided to Sobers because he was an athlete, the Committee was unable to determine whether the involved salesman was a representative of the University's athletic interests. Therefore, the Committee did not believe the University should bear any institutional responsibility for the violation.

*8 During the 1973-74 and 1974-75 academic years, student-athlete Ricky Sobers received the benefit of numerous meals at no cost to him at the Las Vegas Hilton Hotel through the arrangements of Howard Kincaid, a representative of the University's athletic interests; further, Sobers was receiving a full athletic grant-in-aid at the University, including a meal allowance, at the time he was receiving this benefit.

The Committee's finding is based upon information reported to the NCAA by Ricky Sobers on August 14, 1975. Further, both Sobers and Howard Kincaid confirmed the substance of this finding in their interviews with the University. However, it is the position of the University that Kincaid should not be considered a representative of the institution's athletic interests, and that the meals in question should be considered permissible pre-game meals incidental to Sobers' participation in intercollegiate basketball competition.

In this regard, the Committee notes that the University has no records to support the provision of these meals to Sobers as part of the actual and necessary expenses related to his participation on the University's basketball team; further, Sobers initially reported to the NCAA that he could and did obtain complimentary meals through Kincaid's arrangements any time he (Sobers) so desired.

In addition, the Committee believes that Kincaid must be considered a representative of the University's athletic interests inasmuch as he has assisted members of the University's basketball coaching staff by arranging the provision of complimentary meals and entertainment for college basketball coaches visiting the Las Vegas area and, therefore, is involved in promoting the University's intercollegiate athletic program; further, Kincaid was fully aware of Sobers' participation as a member of the University's basketball team at the time he provided complimentary meals for the young man.

D. Violation of the principles governing institutional control [NCAA Constitution 3-2].

*1. The involvement of Ann Cohen, Burrell Cohen, Richard Davis, Frank Denton, Howard Kincaid, Sam Krug, Harvey Munford, Rodney Parker, Art Thomas and Brad Welch, representatives of the University's athletic interests, in numerous violations set forth in this report demonstrates that the University of Nevada, Las Vegas, did not adequately exercise institutional control and responsibility over these individuals.

If the Committee's other findings set forth in this report involving the identified representatives are accepted or upheld for the most part by the Council, the Committee believes this finding to be supported without need

for further explanation or justification. The parts of this report involving each individual are: Ann Cohen, I-C-5; Burrell Cohen, I-C-5; Richard Davis, I-C-4; Frank Denton, I-A-2, I-A-3 and I-A-4; Howard Kincaid, I-C-8; Harvey Munford, I-H-6 and I-H-7; Rodney Parker, I-K-1, I-M-1 and I-N-3, and Brad Welch, I-M-1.

[NOTE: The names of Sam Krug and Art Thomas should be deleted from this finding in light of the Committee's action to withdraw its finding as set forth in Part I-C-3 of this report.]

E. Violations of the principles governing ethical conduct [NCAA Constitution 3-6-(a)].

*1. Former head basketball coach John Bayer as well as present head basketball coach Jerry Tarkanian acted contrary to the principles of ethical conduct inasmuch as they did not, on all occasions, deport themselves in accordance with the generally recognized high standards normally associated with the conduct and administration of intercollegiate athletics, in that their involvement in various violations in this case demonstrates a knowing and willful effort on their part to operate the University's intercollegiate basketball program contrary to NCAA legislation.

If the Committee's other findings set forth in this report involving Jerry Tarkanian are accepted or upheld for the most part by the Council, the Committee believes this finding

to be supported without need for further explanation or justification. The parts of this report involving Tarkanian are I-A-2, I-A-3, I-C-6, I-F-1, I-H-7, I-M-1 and I-O-2. It should be noted that this finding, as it relates to John Bayer, is not being appealed by the University.

F. Violation of the principles of ethical conduct and the cooperative principles governing the NCAA enforcement program [NCAA Constitution 3-6-(a), Bylaw 7-5-(d) and the opening statement of the Official Procedure Governing the NCAA Enforcement Program].

*1. During the course of the NCAA's investigation into the athletic policies and practices of the University's intercollegiate basketball program, Jerry Tarkanian contacted and arranged for other individuals to contact principals involved in the case in an effort to discourage them from reporting information related to violations of NCAA regulations when contacted by members of the NCAA enforcement staff, and in an effort to cause them to give untruthful information to the University. Specifically, among the individuals who have been contacted for this reason by or through the arrangements of Tarkanian are former student-athlete Robert "Jeep" Kelley and Frances Parker, Port Chester, New York.

The Committee's finding is based on information reported to the NCAA by Robert

Kelley and his aunt, Frances Parker, during a period beginning March 5, 1976, and ending December 10, 1976. It should be noted that during this period, the University was actively investigating allegations submitted to it by the NCAA in order to prepare a response to the Committee's February 25, 1976, official inquiry. Inasmuch as the Committee believes this finding is most serious, it wishes to call the following information to the Council's attention:

(a) On March 5, 1976, Mrs. Parker (Port Chester, New York) telephoned an NCAA investigator to report that Kelley (who was residing in Pittsburgh, Pennsylvania) was frightened because he had been told by Jerry Tarkanian that the attorney general from Nevada wished to question him in Nevada because he had provided information to the NCAA. Mrs. Parker also reported that she had been contacted by Mrs. Burrell Cohen (Las Vegas, Nevada) who told her that certain unidentified individuals in Las Vegas wished to talk to her. Mrs. Cohen (identified in the finding set forth in Part I-C-5 of this report) stated that her husband (also identified in the finding set forth in Part I-C-5 of this report) would forward an airline ticket to Mrs. Parker to travel to Las Vegas to "look over the city." Mrs. Parker declined this offer.

(b) On March 5, 1976, an NCAA investigator telephoned Kelley. Kelley reported that Tarkanian recently had told him the attorney general from Nevada wanted to talk with him. Kelley said he was reluctant to admit to Tarkanian that he had previously provided information to the NCAA, and indicated he was concerned in that he did not want himself or his family to be harmed based on his involvement in the case.

(c) On April 2, 1976, Mrs. Parker reported to the NCAA that Kelley had told her he felt obligated to assist Tarkanian in some way in order to insure that his half-brother (Sonny Lewis) would be able to participate in college basketball.

(d) On April 5, 1976, Mrs. Parker reported to the NCAA that Kelley's former high school principal, James Robinson, and Kelley's former high school basketball coach, Spencer Watkins, were pressuring Kelley to sign a statement in Tarkanian's behalf and to travel to Las Vegas. Mrs. Parker reported these individuals told Kelley that if he refused to help Tarkanian it would affect the chances of Sonny Lewis (who was attending Kelley's former high school) to participate in collegiate basketball competition. Mrs. Parker said that Kelley no longer wished to be involved in providing information to the NCAA in this case because he was

receiving excessive pressure to assist Tarkanian from individuals contacting him on Tarkanian's behalf. In this regard, she reported that an attorney from Pittsburgh named DeCello also was attempting to contact Kelley.

(e) Later on April 5, Mrs. Parker telephoned an NCAA investigator to report that Sonny Lewis had just advised her by telephone that Kelley left earlier that afternoon for Las Vegas. Kelley apparently planned to be employed by a construction company in Las Vegas. Further, Lewis told Mrs. Parker that Kelley did not have funds to purchase the airline ticket for this trip, and that someone had provided the ticket for him.

(f) On April 21, 1976, Mrs. Parker reported to the NCAA that Kelley telephoned her from the home of Burrell Cohen in Las Vegas, where Kelley was residing. She reported that Kelley had been contacted by an attorney in Pittsburgh prior to leaving for Las Vegas; further, that a job had been arranged for Kelley in Las Vegas by Tarkanian and Cohen. Kelley reported to Mrs. Parker that he agreed to travel to Las Vegas in an effort to take pressure off of himself and his family in Pittsburgh.

(g) On April 22, 1976, Kelley telephoned an NCAA investigator and reported the following information. Kelley explained

that Cohen had telephoned him in Pittsburgh to advise him that an attorney, Anthony DeCello, wished to talk to him. At the same time, Spencer Watkins, Kelley's former high school coach, was pressuring Kelley to travel to Las Vegas where he would be employed. DeCello, who described himself as an attorney representing the University of Nevada, Las Vegas, met with Kelley in Pittsburgh and then purchased an airline ticket for Kelley to travel that day from Pittsburgh to Las Vegas. Kelley said that he reported false information concerning this case during his conversation with DeCello in an attempt to show that he was on DeCello's side. Kelley also reported that he was residing cost free in the Cohen home while in Las Vegas and that Cohen had arranged to provide him an automobile at no cost. Also, he indicated that Tarkanian had arranged a construction job for him.

(h) On May 11, 1976, Kelley telephoned an NCAA investigator and reported that Tarkanian was en route to the Cohen home to obtain Kelley's signature on some prepared statements. Kelley was concerned about what he should do inasmuch as he believed from his previous conversations with Tarkanian that the statements would contain false information designed to assist Tarkanian in de-

fending himself against the NCAA. Kelley asked what effect his signing false statements would have upon the NCAA's case, and was told that he should attempt to be truthful in his statements to the University, but if he felt compelled to sign false statements, he should remain in contact with the NCAA to explain the reasons for his actions. Later that same evening, Kelley telephoned the NCAA investigator again to report that Tarkanian had, in fact, requested him to sign statements containing false information similar to that he previously had provided DeCello in Pittsburgh. However, Kelley telephoned Mrs. Parker in the presence of Tarkanian and was advised by his aunt not to sign the statements until she was able to review them. Kelley also reported that on this occasion Tarkanian had offered to arrange for him to try out with the Los Angeles Lakers professional basketball team or to arrange for him to participate in a summer basketball league conducted by a friend of Tarkanian's in Southern California.

(i) On May 12, 1976, Mrs. Parker telephoned an NCAA investigator and reported information corroborating Kelley's description of events occurring the previous evening involving herself, Kelley and Tarkanian. In addition, she indicated that Kelley was concerned about the

pressure placed on him in Las Vegas. Mrs. Parker also recalled that Mrs. Lois Tarkanian had telephoned her on an earlier occasion, stating that if the "NCAA finds out anything," her husband (Jerry Tarkanian) would lose his job. Mrs. Parker viewed this telephone call as an attempt by Mrs. Tarkanian to persuade her not to report information against the interests of Jerry Tarkanian.

(j) In July 1976, Kelley telephoned an NCAA investigator and reported that he had returned to Pittsburgh and, in fact, had signed various false statements in Las Vegas at Tarkanian's request. Kelley reported that Tarkanian planned to assist him in enrolling in another collegiate institution, possibly somewhere in California. Kelley stated that he hoped his actions would not hurt the NCAA's case.

(k) On September 28, 1976, Mrs. Parker reported to an NCAA investigator that Kelley was planning to travel to California to enroll in a collegiate institution, but apparently was going to stop in Las Vegas on the way.

(l) On November 29, 1976, Kelley telephoned an NCAA investigator from Honolulu, Hawaii. Kelley reported that Tarkanian arranged for him to attend school in California, but at the last minute was able to arrange for him to receive a bas-

ketball scholarship at the University of Hawaii. Kelley reported that when he left Pittsburgh that September, Tarkanian had arranged for him to travel to Las Vegas on a "junket" flight via United Airlines at no cost to him. Upon arriving in Las Vegas, he resided in the Cohen home cost free for approximately three weeks before traveling on to Hawaii. Kelley reported that while residing in the Cohen home, he was requested to sign additional statements he described as containing "the same lies as before." Thereafter, Cohen gave Kelley approximately $600-$700 which he utilized to pay his transportation costs to Hawaii, as well as his living expenses prior to receiving scholarship assistance from the University of Hawaii.

The Committee believes the information reported to the NCAA during this period by Kelley and Mrs. Parker clearly supports the finding that pressures were applied and various inducements were offered and provided in order to insure Kelley's assistance in protecting the interests of the University and Tarkanian in this case. Further, the Committee believes this finding represents a most serious violation of NCAA legislation in that Tarkanian's actions are contrary to and reflect disregard for the cooperative principles of the NCAA enforcement program and the basic principles of ethical conduct. In this

regard, the Committee directs the Council's attention to the opening statement of the Official Procedure Governing the NCAA Enforcement Program adopted by the Association's membership. This statement reads as follows:

"Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics are, in the final analysis, teachers of young people. Their responsibility is an affirmative one, and they must do more than avoid improper conduct or questionable acts. Their own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example. Much more is expected of them than of the less critically placed citizen.

"All representatives of educational institutions are expected to cooperate fully with the NCAA investigative staff, Committee on Infractions and Council to further the objectives of the Association and its enforcement program. The enforcement procedures are an essential part of the intercollegiate athletic program of each member institution and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA investigative staff, Committee on Infractions or Council during the course of an inquiry."

G. Violation of the principles governing eligibility of student-athletes, and the provisions governing recruiting and institutional eligibility for championship events [NCAA Constitution 3-9-(e); Bylaws 1-1-(a) and 4-6-(b)].

*1. In the summer following the 1970-71 academic year, then head basketball coach John Bayer arranged for prospective student-athletes Dan Cunningham, Salinas, California; James Baker, Philadelphia, Pennsylvania; Eddie Taylor, Philadelphia, Pennsylvania, and Don Weimer, Chula Vista, California, to be provided the correct answers to questions contained on a precollege enrollment test prior to the time the test was to be administered to the young men at the institution; further, these arrangements were made by Bayer to insure that each young man achieved a high enough score on the test to qualify for athletically related financial assistance, practice and play during the 1971-72 academic year at the University under the prediction requirements of NCAA Bylaw 4-6-(b) [1.600 rule]; further, prior to the test, Bayer arranged for then assistant basketball coach Fred Albrecht to assist the young men in memorizing the correct answers to the test, as well as the questions to answer incorrectly in an effort to avoid calling attention to the young men's unusually high test scores; finally, these improperly achieved test scores were actually utilized by the University to establish each young man's eligibility for aid, practice and play during the 1971-72 academic

year under the requirements of the 1.600 rule.

The Committee's finding is based upon information reported to the NCAA by Dan Cunningham in the presence of his parents in January 1974, as well as supporting information provided by John Bayer, Eddie Taylor and the parents of Don Weimer. In this regard, it should be noted that Bayer was interviewed by the NCAA on April 3, 1974, concerning this matter. Following a description by the NCAA investigator of his understanding of the information set forth in this finding (i.e., that the young men were actually given the correct answers to the test in question, and were also told which questions should be answered incorrectly), Bayer confirmed at that time that the NCAA was aware of "what went on with the test." Further, Bayer then suggested that the NCAA investigate testing procedures utilized in situations involving several additional athletes enrolled in the University. The Committee believes Bayer's comments represent an acknowledgement of the facts of this finding, and the Committee asks the Council to also note that at the time he was initially confronted with this information by the NCAA, Bayer did not make any statement to deny the facts set forth in this finding.

Further, Dan Cunningham has confirmed the information set forth in this finding in his

interview with the University. Although Bayer and Taylor have provided substantially different information to the University than they initially reported to the NCAA, the Committee accepts the information originally provided by these individuals and in this regard again directs the Council's attention to Part IV-C of this report.

The Committee also notes that based on a review of each young man's academic background and previous test scores, it appears highly improbable that the young men could have achieved legitimately the scores credited to them in this instance. In this regard, the Committee believes the information reported by the principals in this situation is sufficient to support the Committee's finding; however, it should be noted that additional data concerning each young man's actual test scores and academic background is a matter of record in this case and is available for the Council's consideration.

It should also be noted that the provision of transportation for each young man's visit to Las Vegas for the administration of this test is acknowledged by the University and is set forth in Part I-J-1 of this report.

The University has asserted that this finding, if upheld by the Council, would not represent a violation of NCAA Bylaw 1-1-(a) [improper inducements]. In this regard, the Committee notes that both the Council and

the Committee have found in past cases that arrangements to credit prospective student-athletes with improperly achieved scores on precollege enrollment tests have been considered improper inducements to encourage the prospective student-athletes to enroll in the involved institutions. In fact, without such assistance the prospects in question probably would not have qualified for athletically related financial aid, practice and play during their freshman years in residence and likely would have attended different collegiate institutions. Examples of previous cases involving similar findings are California State University, Long Beach; McNeese State University, and the University of Southwestern Louisiana.

H. Violations of the provisions governing recruiting [NCAA Bylaw 1-1-(a)].

1. In April 1971, in an effort to encourage the enrollment of prospective student-athlete Chad Meyer, Lodi, California, then head basketball coach John Bayer promised the young man that he would arrange for Meyer to purchase a new automobile at a cost of approximately $400-$500 during his attendance at the University.

2. During the 1970-71 academic year, while recruiting prospective student-athlete Chad Meyer, Lodi, California, then head basketball coach John Bayer promised to arrange for the young man's parents to be provided

air transportation to Las Vegas at no cost to the Meyers in order to attend basketball games in which their son would be participating as a member of the University's intercollegiate basketball team; further, Bayer promised to arrange cost-free lodging in Las Vegas for the young man's parents during these trips.

3. In April 1971, then head basketball coach John Bayer arranged for a representative of the University's athletic interests, who was a member of the dental profession in Las Vegas, to promise then prospective student-athlete Chad Meyer, Lodi, California, and his mother that the young man would receive cost-free dental care during his attendance at the University.

*4. In April 1971, during the official paid visit to the University's campus of prospective student-athlete Maurice Presley, Houston, Texas, then head basketball coach John Bayer promised to arrange for Presley to be given a new automobile during his attendance at the University.

The Committee's finding is based upon information reported to the NCAA on March 1 and 2, 1973, during separate interviews with Maurice Presley, Presley's father and Walter Yates, the young man's former high school basketball coach. The Committee believes the Council should note that all three indi-

viduals were present when this offer was made and each reported similar details related to the promise by Bayer. In this regard, each individual (Presley, his father and Yates) identified the same location (i.e., a Las Vegas automobile agency) where the offer was made by Bayer. In addition, it should be noted that during the time in question, Bayer was involved in the offer of various improper inducements to other prospective student-athletes (reference: Parts I-H-1, 2, 3 and 5 of this report) which are not the subject of appeal by the University in this case.

The University's appeal of this finding is based on information developed in its interviews with Presley, his father, Yates and Bayer. The Committee has considered this conflicting information and accepts the original statements of Presley, his father and Yates on the basis that these individuals would have no reason or opportunity to report the alleged violation in detail in separate interviews if, in fact, no offer had been made by Bayer. In addition, the Committee again directs the Council's attention to Part IV-C of this report.

5. In April 1971, in an effort to encourage the enrollment of prospective student-athlete Ed McPheters, Stockton, California, then head basketball coach John Bayer promised McPheters that he would arrange for the young man to receive the following benefits during

his attendance at the University: (a) a sum of money; (b) a new wardrobe, and (c) a new Camaro automobile.

*6. During the 1973-74 academic year, Harvey J. Munford, a representative of the University's athletic interests, cosigned a note at the Mediterranean Furniture Company in Las Vegas in order for prospective student-athlete David Vaughn to purchase furniture at a cost of approximately $600; further, Munford eventually paid approximately $400 from his own personal funds to retire the note.

The Committee's finding is based on information initially reported by Harvey Munford to the NCAA on October 8, 1975, and confirmed by Munford in his interview with the University. However, it is the University's position that although Munford did sign the note in question, he should not be considered a representative of the institution's athletic interests.

The Committee believes Munford is a representative of the University's athletic interests for the following reasons: (a) Munford was a part-time employee at the University and reported to the NCAA that he has been closely associated with members of the University's coaching staff for several years; (b) Munford reported that he has assisted the University in recruiting, including during the 1973-74 academic year, when

he was requested by Jerry Tarkanian to assist in the recruitment of prospective student-athlete David Vaughn at the time the young man made his official paid visit to the University's campus; (c) Munford reported that through the encouragement of Jerry Tarkanian and assistant basketball coach Tony Morocco, he occasionally contacted prospective student-athlete David Vaughn and his wife for recruiting purposes during the 1973-74 academic year, and (d) if the Council accepts the Committee's finding as set forth in Part I-H-7 of this report, Tarkanian requested Munford to assist prospective student-athlete David Vaughn as described therein.

Although Munford acknowledges cosigning the note in question, the University also asserts that Munford signed this note in an effort to encourage Vaughn to participate in an AAU basketball tournament. The Committee notes that even if this was the case, which the Committee does not believe, it would not be permissible for a representative of the University's athletic interests to cosign such a note for a prospective student-athlete. Further, the Committee believes Munford signed this note because he was encouraged to do so by a member of the University's basketball coaching staff as reported initially by Munford to the NCAA on October 8, 1975, and again on November 9, 1976. The Committee notes that Munford

has been contacted on several occasions by the NCAA, and that Munford first identified Jerry Tarkanian and then assistant basketball coach Tony Morocco as the individuals encouraging him to cosign this note. The Committee believes Munford's present claim that none of the University's coaches encouraged him to cosign the note, as reported during his interviews with the University, represents an attempt by Munford to remove himself from involvement in this case. The Committee believes Munford initially provided accurate information to the NCAA and again directs the Council's attention to Part IV-C of this report for additional information in this regard.

*7. During the 1973-74 academic year, head basketball coach Jerry Tarkanian arranged for Harvey J. Munford, a representative of the University's athletic interests and a part-time instructor at the University, to provide prospective student-athlete David Vaughn a "B" grade in a course taught by Munford at the University (The Role of Black Development in America) with the understanding that Vaughn would not attend any classes or do any course work.

The Committee's finding is based upon information initially reported to the NCAA by Harvey Munford on October 8, 1975, and confirmed in an interview with the NCAA on February 27, 1976. It should be noted

that when contacted during the University's review of this matter, Munford denied reporting this information to the NCAA. In this regard, the Committee notes that prior to Munford's October 8, 1975, interview, the NCAA was not in possession of specific information concerning Munford's relationship with prospective student-athlete David Vaughn or the young man's enrollment in the class identified in this finding. However, when Vaughn's University of Nevada, Las Vegas, transcript was obtained subsequent to this initial interview, the transcript corroborated information provided by Munford to the extent that Vaughn, in fact, had been enrolled in the class identified in this finding, and had been credited with a "B" grade.

The Committee believes it unlikely that Munford would have initially provided the specific detailed information set forth in this finding, if the information was not accurate. Also, the Committee notes that although on February 27, 1976, Munford confirmed this information to the NCAA, he also reported that when faced with the prospect of being interviewed by officials of the University of Nevada, Las Vegas, he was not certain whether in that situation he would tell the truth concerning the improper grade, or might find it necessary to furnish false information indicating that Vaughn actually attended the class, thus leaving the Committee on Infractions in the position of attempting to determine what information was accurate.

Throughout consideration of this matter by the Committee, it has been the position of the University and Munford (as well as his legal counsel) that Munford did not report the information set forth in this finding to the NCAA. Munford also has denied to the University that he provided an improper grade to Vaughn as described. After careful consideration of this conflicting information, the Committee believes Munford did, in fact, provide this information to the NCAA and is now attempting to remove himself from involvement in this case. For additional information in this regard, the Committee again directs the Council's attention to Part IV-C of this report.

I. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-3].

*1. For an approximate one-month period during the University's "mini semester" conducted between terms in the 1973-74 academic year, prospective student-athlete David Vaughn was permitted to participate on various occasions in the University's organized basketball squad practice sessions although Vaughn had not been officially accepted for admission to the institution.

Both the University and the NCAA agree that prospective student-athlete David Vaughn

participated in organized basketball squad practice sessions during the University's one-month "mini semester" conducted between terms in the 1973-74 academic year. The basis for the Committee's finding is that a "mini semester" is not considered to be a regular term for purposes of applying NCAA legislation and, therefore, Vaughn was a prospective student-athlete (rather than a regularly enrolled student-athlete) at the time of his participation in the practice sessions; further, Vaughn was never officially accepted for admission as a regular student to the University as required by NCAA Bylaw 1-3-O.I. 110, in order to participate in organized practice sessions. Therefore, Vaughn should not have been permitted to participate in the University's organized basketball practice sessions between regular terms of the University's academic year.

In past infractions cases, both the Council and the Committee have found that the improper participation of prospective student-athletes in athletic tests or practice sessions constitutes a violation of NCAA Bylaw 1-1-(a) [improper inducements] and Bylaw 1-3 (tryouts), inasmuch as such participation may encourage a prospective student-athlete, to enroll in the institution, as well as violate the tryout rule. Examples of past cases involving such findings are California State University, Long Beach; North Carolina State University, and the University of Minnesota.

J. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a), 1-5-(a) and 1-5-(c)].

1. Through the arrangements of then head basketball coach John Bayer, prospective student-athletes James Baker, Philadelphia, Pennsylvania; Dan Cunningham, Salinas, California; Eddie Taylor, Philadelphia, Pennsylvania, and Don Weimer, Chula Vista, California, were provided two paid visits to the University's campus at the expense of the University. Specifically, Bayer arranged for each young man to be provided an initial visit at the University's expense during the 1970-71 academic year, and arranged for the young men to receive round-trip transportation at no cost to them between their homes and Las Vegas in conjunction with a second visit during the summer following the 1970-71 academic year.

K. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-5-(b)].

*1. During April 1973, Rodney Parker, a representative of the University's athletic interests, provided $10 cash to Steve Masterson, a friend of prospective student-athlete Rudy Jackson, in order to reimburse Masterson for expenses incurred in transporting Jackson and prospective student-athlete Tico Wynder via automobile from Hutchinson to Wichita, Kansas (approximately 40 miles one way), to meet with Parker.

The University and the NCAA agree that the transaction described in this finding occurred, and that the transaction occurred the day before Parker accompanied Jackson to Las Vegas for the young man's official paid visit to the University's campus. However, it is the University's position that Parker should not be considered a representative of the institution's athletic interests.

The Committee believes Rodney Parker is a representative of the University's athletic interests for the following reasons: (a) Parker initially reported to the NCAA on May 15, 1974, that Jerry Tarkanian had requested that Parker assist the University of Nevada, Las Vegas, in recruiting Rudy Jackson; further, that Tarkanian's request was made during a conversation at a high school all-star game prior to the time Parker became involved in the transaction set forth in this finding; (b) Parker initially reported to the NCAA that Brad Welch, a representative of the University's athletic interests, arranged for Parker to accompany Rudy Jackson at the time the young man made his official paid visit to the University of Nevada, Las Vegas; (c) prospective student-athletes Tico Wynder and Rudy Jackson have reported to the NCAA that Parker telephoned Jackson to make the arrangements for the young man's official paid visit to the University, and (d) based upon the information developed by the NCAA staff in this case, as well as information developed concerning Jackson's recruitment in a previous infractions case involving another NCAA member institution, it appears that Parker was not involved in Jackson's recruitment by any other collegiate institution.

The Committee has considered information reported by Rodney Parker to the University indicating that Parker merely attempts to assist various prospective student-athletes during the course of their recruitment and should not be considered as a representative of any one institution's athletic interests in terms of Jackson's, or any other prospective student-athlete's, recruitment. In this regard, the Committee believes the Council should note that regardless of the purpose Parker envisions for his involvement in a prospective student-athlete's recruitment, the fact remains that under NCAA legislation if a member institution's staff member requests or has knowledge of Parker's assistance in the recruitment of a prospect for that institution, then Parker must be considered a representative of that institution's athletic interests.

The Committee also notes that Parker now takes the position that his involvement in the University's recruitment of Jackson occurred on his (Parker's) own initiative, and that he has never reported information to the NCAA indicating that Tarkanian and

Welch requested his assistance. After considering this information, it is the Committee's belief that Parker has reported false information to the University in an attempt to remove himself from involvement in this case and has disclaimed the information he originally provided the NCAA accordingly. For additional information related to the Committee's position in this regard, the Council's attention is again directed to Parts IV-C and IV-E of this report.

L. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-5-(e)].

1. In April 1971, then head basketball coach John Bayer arranged for John Presley, the father of prospective student-athlete Maurice Presley, Houston, Texas, to be provided round-trip transportation at no cost to him between Houston and Las Vegas, Nevada, in conjunction with his son's official paid visit to the University's campus.

M. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a), 1-5-(e), 1-5-(e)-(3), 1-5-(f) and 1-5-(i)].

*1. During April 1973, head basketball coach Jerry Tarkanian and Brad Welch, a representative of the University's athletic interests, arranged for Rodney Parker, another representative of the University's athletic interests, to accompany prospective student-athletes Rudy Jackson and Tico Wynder on their official paid visits to the University's

campus at no expense to Parker. Specifically, through the arrangements of Tarkanian and/or Welch, Parker accompanied the young men on a commercial airline flight from Wichita, Kansas, to Las Vegas; further, Tarkanian and/or Welch arranged for Parker to be provided lodging at the Dunes Hotel, and meals and entertainment in Las Vegas during the official paid visits of the young men at no expense to Parker; further, for approximately two days after the prospects returned home, Parker was permitted to remain in Las Vegas while continuing to receive lodging, meals and entertainment at no expense to him; finally, Welch gave Parker approximately $300 cash in order to reimburse Parker for his travel expenses to Las Vegas from Wichita, and to pay the cost of one-way commercial airline transportation between Las Vegas and New York.

The University and the NCAA are in agreement that Rodney Parker accompanied prospective student-athletes Rudy Jackson and Tico Wynder on their official paid visits to the University's campus; further, that Parker was provided lodging at the Dunes Hotel, meals and entertainment in Las Vegas at no personal expense; finally, that for approximately two days after the prospects in question returned home, Parker remained in Las Vegas while continuing to receive lodging, meals and entertainment at no personal ex-

pense. However, the University denies that Parker received approximately $300 cash from Brad Welch as reimbursement for his travel expenses on this occasion, that Welch or Jerry Tarkanian were involved in any of the arrangements for the lodging, meals and entertainment provided Parker on this occasion, or that Parker is a representative of the University's athletic interests.

The Committee's finding is based on information reported to the NCAA by Parker, who described the arrangements for his transportation, lodging, meals and entertainment on this occasion as set forth in the statement of the finding. The Committee believes the Council should note that Parker specifically identified Welch as the individual who made these arrangements; further, Parker indicated that Jerry Tarkanian had previously requested his (Parker's) assistance in the recruitment of one of the prospective student-athletes Parker accompanied on this visit. In addition, Parker initially reported to the NCAA that he was provided approximately $300 cash by Welch as reimbursement for his personal expenses.

The Committee has considered the information reported by Parker to the University indicating that an individual with no relationship to the institution's athletic interests made the arrangements for the lodging, meals and entertainment in question; further, that Parker paid for his own transportation ex-

penses. It is the Committee's belief that Parker has altered the information he initially provided the NCAA, and which he now claims he never provided the NCAA, in order to remove himself from involvement in this case. For additional information in this regard, the Committee again directs the Council's attention to Parts IV-C and IV-E of this report. Finally, the Committee believes that Parker should be considered a representative of the University's athletic interests for the reasons set forth as the basis for its finding in Part I-K-1 of this report.

N. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-5-(f)].

*1. Beginning in the 1970-71 academic year and continuing until the present time, prospective student-athletes making their official visits to the University's campus have been lodged in local, luxury hotels in Las Vegas which provide facilities which are not on a scale comparable to that of normal student life on campus, in that minimum regular rates of approximately $30 per day are charged; further, prior to the fall, 1973-74 academic year, prospective student-athletes were escorted to or permitted to attend dinner shows and other live entertainment at these and similar luxury hotels at no cost to them, resulting in the payment or provision of excessive entertainment for these young men, in that normal admission prices of approx-

imately $22 per person for a dinner show and approximately $15 per person for a late-night show were charged at these hotels.

It is the Committee's position that the Las Vegas luxury hotels located primarily on the Las Vegas "strip" provide facilities which are not on a scale comparable to that of the normal student life on the University's campus as required by NCAA Bylaw 1-5-(f). The University has submitted information indicating that it utilizes the facilities of these hotels because they are near the University's campus and offer rates comparable to chain motels such as Holiday Inn, Howard Johnson's and Travel Lodge.

Although the University has reported information indicating that it is able to secure lodging for prospective student-athletes at luxury hotels for costs comparable to the rates charged at chain motels, the Committee notes that the critical factor in terms of compliance with NCAA regulations governing the lodging of prospective student-athletes is not the cost charged the University, but whether the facilities available at these luxury hotels are comparable to facilities available on campus. In this regard, the Committee also notes that luxury hotels could provide lodging and entertainment for a prospective student-athlete at no charge to a member institution, and the provision of such lodging and entertainment would still be contrary to

NCAA recruiting regulations, inasmuch as these regulations relate to benefits provided the prospective student-athlete, rather than the cost of such benefits to the institution. Similar findings have been made on this basis in previous infractions cases, including West Texas State University and the University of Minnesota.

It should be noted that beginning in the fall of the 1973-74 academic year, the University has limited the entertainment of prospective student-athletes housed at these luxury hotels. However, prior to the fall of the 1973-74 academic year, prospective student-athletes were entertained at dinner shows and performances at these luxury hotels at no personal expense resulting, in the Committee's opinion, in excessive entertainment for these prospects under the requirements of Bylaw 1-5-(f). The Committee believes the fact that the University, on its own initiative, curtailed such entertainment of prospective student-athletes at these hotels is supportive of the Committee's position.

*2. In April 1973, during the official paid visit of prospective student-athlete Eddie Owens, Houston, Texas, then assistant basketball coach Tony Morocco provided an automobile to the young man for his personal use for an evening at no cost to Owens.

The Committee's finding is based upon information reported to the NCAA by Eddie

Owens on May 29, 1973. It should be noted that this interview was conducted prior to Owens' initial enrollment in the University, approximately two months after the incident in question. The University has submitted information obtained from Owens in May 1976 indicating that the information he originally provided the NCAA is incorrect. Further, the University is unable to identify the owner of an automobile similar to the one originally described by Owens.

It is the Committee's position that Owens did report accurate information during his initial interview with the NCAA, inasmuch as he described in detail the arrangements by Morocco to provide him the use of an automobile shortly after the incident occurred; further, the Committee believes that at the time of this original interview, Owens had no reason to provide false information to the NCAA. The Committee does not believe it would be necessary to identify the owner of this automobile in order to establish that a violation occurred in this instance. The fact that assistant basketball coach Tony Morocco made this automobile available to Owens, regardless of the identity of the automobile's owner, is clearly contrary to the provisions of Bylaws 1-1-(a) and 1-5-(f).

The University has submitted information indicating that it does not believe that this finding constitutes a violation of NCAA Bylaw 1-1-(a) [improper inducement]. In this

regard, the Committee notes that the offer or provision of any financial aid or equivalent inducement (e.g., the use of an automobile) not otherwise permitted by NCAA legislation in the recruitment of prospective student-athletes has been considered by both the Committee and Council in past infractions cases to constitute an improper inducement. Examples of the application of this legislation to similar situations can be found by the Council in numerous past infractions cases involving violations of NCAA recruiting regulations.

*3. During April 1973, while recruiting prospective student-athletes Rudy Jackson and Tico Wynder, Hutchinson, Kansas, Rodney Parker, a representative of the University's athletic interests, paid the expenses for one night's lodging and a meal for the young men at the Diamond Inn Motel in Wichita, Kansas.

The University and the NCAA agree that the facts set forth in this finding occurred as described, and that these events occurred the day before Rodney Parker accompanied Jackson and Wynder to Las Vegas for the young men's official paid visits to the University's campus. However, as previously noted, it is the University's position that Parker should not be considered a representative of the institution's athletic interests.

In this regard, the Committee directs the Council's attention to the information set

forth in Part I-K-1 of this report as it relates to the description of Parker's relationship to the University's athletic interests in this case. For additional information concerning the Committee's position in regard to information provided the University by Parker, the Council's attention is again directed to Parts IV-C and IV-G of this report.

O. Violations of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-6(a)].

1. In April 1971, in an effort to encourage the enrollment of prospective student-athlete Dan Cunningham, then head basketball coach John Bayer promised the young man and his parents that Cunningham would receive a full athletic grant-in-aid at the University for a period of five years.

*2. Prior to the beginning of classes for the 1973-74 academic year, head basketball coach Jerry Tarkanian arranged for prospective student-athlete Robert "Jeep" Kelley to be provided the benefit of one-way commercial airline transportation at no expense to Kelley to travel between his home in Pittsburgh, Pennsylvania, and Las Vegas, Nevada, for the purpose of enrolling in and attending classes at the University during that academic year; further, upon arriving in Las Vegas during the summer, Tarkanian arranged for Kelley to be lodged for approximately one month, at no expense to Kelley, with student-athlete Ricky Sobers at the

Sierra Vista Apartments in Las Vegas, Nevada.

The Committee's finding is based upon information reported to the NCAA by Robert Kelley on May 15, 1975. Kelley stated that he received the benefits as described through the arrangements of Tarkanian as found by the Committee.

The University's appeal is based primarily on information developed during its interviews with Kelley. As previously noted, the Committee believes that after Kelley provided information to the NCAA related to this and other findings, he was improperly encouraged and pressured to provide the University false information. In this regard, the Committee again directs the Council's attention to Parts I-F-1, IV-C and IV-E of this report.

3. During the 1973-74 academic year, assistant basketball coach Tony Morocco arranged for his nephew, Tom Morocco, to pay (with cash provided by Tony Morocco) the cost to rent a U-Haul trailer utilized to move the household goods of prospective student-athlete David Vaughn from his home in Tulsa, Oklahoma, to Las Vegas, Nevada (approximately 1000 miles), as well as the costs incurred by Morocco and Vaughn for gasoline, room and board during the trip.

4. During the 1973-74 academic year, assistant basketball coach Tony Morocco arranged for

Bill Dougherty (who was residing in the Morocco home in Las Vegas at the time) to transport prospective student-athlete David Vaughn, Tulsa, Oklahoma, in Vaughn's automobile from Flagstaff, Arizona, to Las Vegas (approximately 150 miles) at no cost to Vaughn.

P. Questionable practice in light of NCAA requirements [NCAA Bylaw 4-6-(d)].

1. At a time when certain practices of the University's intercollegiate basketball program were not in compliance with NCAA legislation, the chief executive officer of the University, Donald H. Baepler, based upon information provided by athletic department staff members and without intent to do so, erroneously certified on May 21, 1974, the University's compliance with NCAA legislation.

Q. Violation of the provisions governing certification of compliance with NCAA legislation [NCAA Bylaw 4-6-(d)].

*1. With full knowledge at the time that certain practices of the University's intercollegiate basketball program were not in compliance with NCAA legislation, head basketball coach Jerry Tarkanian failed to report to University officials during an institutional review conducted in conjunction with the University's May 21, 1974, certification of compliance with NCAA legislation, his knowledge of and involvement in any violations of NCAA legislation.

The Committee's findings set forth in Parts I-A-2, I-A-3, I-C-6, I-H-7, I-M-1 and I-O-2 of this report relate to Jerry Tarkanian's involvement in events which occurred prior to the University's May 21, 1974, certification of compliance with NCAA legislation. If any of these findings are upheld by the Council, the Committee believes this finding (I-Q-1) to be supported without need for further explanation or justification, other than to note that Tarkanian failed to report his knowledge of or involvement in the violation(s) upheld by the Council.

R. Questionable practice in light of NCAA requirements [NCAA Bylaws 4-6-(d) and 4-6-(d)-(4)].

*1. At a time when certain practices of the University's intercollegiate basketball program were not in compliance with NCAA legislation, head basketball coach Jerry Tarkanian attested to the chief executive officer of the University on a statement filed in conjunction with the University's June 25, 1975, certification of compliance with NCAA regulations, that he had reported his knowledge of and involvement in any violations of NCAA legislation involving the institution.

It should be noted that the Committee did not find a violation in regard to this certification. However, if the Council upholds any of the Committee's findings set forth in Parts I-A-3, I-A-5, I-C-5 and I-C-8 of this

report, it is the Committee's position that head basketball coach Jerry Tarkanian was in a position to know, if in fact he did not know, that these violations had occurred and should have been reported at the time he signed the staff certification statement associated with the University's June 25, 1975, certification of compliance with NCAA legislation.

II. Penalty to be imposed upon institution, as proposed by Committee.

[NOTE: Each penalty appealed by the University of Nevada, Las Vegas, is identified by an asterisk (*). The primary reasons for the Committee on Infractions' proposed penalties are set forth at the conclusion of this section and are separated by a line.]

*A. The University of Nevada, Las Vegas, shall be publicly reprimanded and censured, and placed on probation for a period of two years from the date this penalty is imposed, which shall be the date established by NCAA Council action as a result of an appeal by the University to the Council, it being understood that should any of the penalties in this case be set aside for any reason other than by appropriate action of the Association, the penalty shall be reconsidered by the NCAA; further, prior to the expiration of this period of probation, the NCAA shall review the athletic policies and practices of the University.

*B. During the probationary period, the University's intercollegiate basketball team shall end its seasons with the playing of its last, regularly scheduled inseason contest and the University shall not be eligible to participate in the National Collegiate Basketball Championship or any other postseason basketball competition.

*C. During the probationary period, the University's intercollegiate basketball team shall not be eligible to appear on any television series or program subject to the administration or control of this Association, and the institution shall not make any commitments for such appearances prior to the University being restored to full rights and privileges of NCAA membership.

*D. During the 1978-79 academic year, no more than three student-athletes in the sport of basketball shall receive initial, athletically related financial aid (as set forth in O.I. 500) which has been arranged for or awarded by the University of Nevada, Las Vegas, regardless of the time such aid becomes countable under the requirements of NCAA Bylaw 5.

*E. During the 1979-80 academic year, no more than three student-athletes in the sport of basketball shall receive initial, athletically related financial aid (as set forth in O.I. 500) which has been arranged for or awarded by the University of Nevada, Las Vegas, regardless of the time such aid becomes countable under the requirements of NCAA Bylaw 5.

[NOTE: In the event no more than three student-athletes in the sport of basketball are permitted to receive initial, athletically related financial aid (as

set forth in O.I. 500) during the 1977-78 academic year, regardless of the time such aid is countable under the requirements of NCAA Bylaw 5, this is notification that the penalties set forth in Parts II-D and E above shall be applied to the 1977-78 and 1978-79 academic years respectively.]

F. The Committee on Infractions requests the University of Nevada, Las Vegas, to show cause, in accordance with Section 7-(a)-(12)-(i) of the Official Procedure Governing the NCAA Enforcement Program, pages 119-120, 1976-77 NCAA MANUAL, why additional penalties should not be imposed upon the University if it does not take appropriate disciplinary and corrective action with regard to:

1. Former assistant basketball coach Fred Albrecht which, in the Committee's present view, should be complete severance of any and all relations Albrecht may have, formally or informally, with the University's intercollegiate basketball program during the probationary period including, but not limited to, his financial support, recruiting efforts and membership in institutional basketball booster groups.

2. Former head basketball coach John Bayer which, in the Committee's present view, should be complete and permanent severance of any and all relations Bayer may have, formally or informally, with the University's intercollegiate athletic program including, but not limited to, his financial support, recruiting efforts and membership in institutional athletic booster groups.

3. Ann Cohen, Burrell Cohen, Richard Davis, Frank Denton, Howard Kincaid, Sam Krug, Harvey Munford, Rodney Parker, Art Thomas and Brad Welch, representatives of the University's athletic interests, which, in the Committee's present view, should be complete and permanent severance of any and all relations these individuals may have, formally or informally, with the University's intercollegiate athletic program including, but not limited to, their financial support, recruiting efforts and membership in institutional athletic booster groups.

[NOTE: The names of Sam Krug and Art Thomas should be deleted from this show cause requirement inasmuch as the Committee has withdrawn its finding (Part I-C-3 of this report) involving these individuals.]

4. Head basketball coach Jerry Tarkanian which, in the Committee's present view, should be complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period of the University's probation including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups and public relations or fund-raising activities related to the University's athletic program.

[NOTE: Your attention is directed to Section 7-(a)-(12) of the Official Procedure Governing the NCAA Enforcement Program, page 120, 1976-77 NCAA MANUAL. Inasmuch as the University has appealed the findings of violations set forth in this report involving each of the individuals identified in Parts II-F-1 through 4 of the proposed penalty in this case, the Committee on Infractions' show cause requirement described in Part II-F will not be in effect in regard to the individuals identified in the appropriate findings, until the NCAA Council has acted upon the University's appeal. If the Council arrives at a conclusion in regard to an appealed finding which substantially sustains the Committee on Infractions' finding of violation involving the individual in question, the 15-day period of the show cause requirement set forth in Section 7-(a)-(12) shall begin with the date of receipt by the University of written notification of the Council's action. If the Council substantially alters the Committee's finding of violation involving the individual, the Committee will reconsider the show cause requirement involving the individual and the University will be notified of the Committee's conclusion.

The University's attention is directed to page 120 of the 1976-77 NCAA MANUAL where the show cause procedures are clearly described, including the responsibility of the institution to provide due notice and hearing to the involved individual before taking any disciplinary or corrective action. Also, information set forth on page 120 describes the responsibilities of the institution in regard to written notification to the NCAA within the appropriate

15-day period applicable to the show cause requirement. Also, note that the determination of whether the actions taken by the University are appropriate with regard to this show cause requirement shall be solely that of the Committee on Infractions.]

[NOTE: When such penalties and corrective actions as are determined by the Council become effective, the University should take every precaution to insure that the terms of the penalties and corrective actions are observed. Further, the Committee on Infractions intends to monitor the penalties and corrective actions during their effective periods, and any action contrary to their terms shall be considered grounds for extending their provisions and the University's probationary period.]

The University has appealed the penalties identified in this report, based primarily on the contention that for the most part the serious violations in this case did not occur; further, the University has cited additional reasons set forth in President Baepler's May 13, 1977, letter appealing the proposed penalties. If the Council upholds for the most part the appealed findings, the Committee believes the proposed penalties are fully justified. However, the Committee also submits the following paragraphs which include several of the primary factors considered in arriving at the penalties and serve to respond to the specific reasons cited by the University for its appeal

1. It should be noted that the findings of the Committee in this case include violations of various sections of the NCAA Constitution and Bylaws

related to improper aid and extra benefits to prospective and enrolled student-athletes, institutional control and responsibility, ethical conduct, recruiting, institutional eligibility for championship events, certification of compliance with NCAA legislation, and the cooperative principle of the NCAA enforcement program. Specifically, the Committee found violations of NCAA Constitution 3-1-(g)-(5), 3-1-(g)-(6), 3-2, 3-4-(a), 3-6-(a) and 3-9-(e), and Bylaws 1-1-(a), 1-3, 1-5-(a), 1-5-(b), 1-5-(c), 1-5-(e), 1-5-(e)-(3), 1-5-(f), 1-5-(i), 1-6-(a), 4-6-(b), 4-6-(d) and 7-5-(d), and the opening statement of the Official Procedure Governing the NCAA Enforcement Program. In addition, the Committee found questionable practices related to the University's certification of compliance with NCAA legislation under the provisions of Bylaws 4-6-(d) and 4-6-(d)-(4). In the event the Council upholds for the most part the Committee's findings, it should be noted the Committee believes these numerous, varied and serious violations were not the result of inadvertent actions or ignorance of NCAA rules; rather, the Committee believes this case demonstrates a disregard for the governing legislation on the part of certain University staff members and athletic representatives, and, therefore, the proposed penalties in this case are fully justified.

2. The University has appealed the proposed penalties in this case in part on the basis that the University has not been involved in a previous infractions case. It should be noted that in determining the proposed penalties in any infractions case, the Committee considers the institution's previous record of involvement in such cases. Specifically, the provisions of Section 7-(a) of the Official Procedure Governing the NCAA Enforcement Program state in part that "previous violations of NCAA legislation shall be a contributing factor in determining the degree of penalty."

Accordingly, had the University been involved in a previous infractions case, the proposed penalties in this case would have been substantially more severe. On the other hand, the Committee believes the University's past record would not be reason to further or completely relieve the institution of its responsibility for the violations found by the Committee in this case.

3. The University has appealed the Committee's proposed penalties based in part upon disciplinary and corrective actions already taken by the University. Based upon information presented by the University to date, the Committee is not aware of any disciplinary action which has been taken by the University as a result of violations in this case. In regard to corrective actions cited by the University, the institution contends that its decision to dismiss former head basketball coach John Bayer in the spring 1973 was based upon his "care-free attitude about possible NCAA penalties being imposed against the institution." In this regard, it should be noted that this action concerning Bayer was not based on any findings by the University that he actually was involved in violations of NCAA legislation.

Based upon its findings in this case, the Committee does not believe the University's selection of head basketball coach Jerry Tarkanian as Bayer's replacement represents a meaningful solution to the concerns expressed by the institution in the spring 1973. In the event the Council accepts the Committee's finding as set forth in Part I-M-1 of this report, it should be noted that Tarkanian was involved in a violation of NCAA legislation approximately two weeks after the date he began employment with the University. Further, Brad Welch, a representative of the University's athletic interests who has been identified as a principal spokesman for the institution in encouraging Tarkanian to accept employment with the University, is also identified in the finding set forth in Part I-M-1 of this report. Additional findings by the Committee involving Tarkanian are set forth in Parts I-A-2, I-A-3, I-C-6, I-E-1, I-F-1, I-H-7, I-O-2, I-Q-1 and I-R-1 of this report.

It should also be noted that at the time Tarkanian was hired, he was a principal in an infractions case under consideration by the Committee involving California State University, Long Beach. Although the processing of this case was confidential under NCAA requirements, no information has been presented to the Committee to indicate that the University of Nevada, Las Vegas, contacted officials of California State University, Long Beach, to obtain any information related to Tarkanian's past performance at the time the decision was made to employ him as Bayer's replacement.

In summary, based upon all available information, the Committee does not accept the University's contention that Tarkanian was, in fact, more willing to abide by NCAA legislation than his predecessor. To the contrary, the Committee believes the University's assertion of its good intions in replacing Bayer with Tarkanian is not supported by the information in this case. Accordingly, the Committee does not believe the University's action in this instance warrants consideration as a mitigating factor in this case.

The University also contends that various personnel changes involving the former president of the University and the former director of athletics, as well as a general reorganization of the athletic department, should be considered as mitigating factors. The Committee does not believe that this information is significant in consideration of a penalty in this case, inasmuch as no information has been submitted to support a conclusion that these actions resulted from findings of actual violations of NCAA regulations. Rather, the available information indicates the actions in question were based upon a general lack of interest in the control of the University's athletic program on the part of the individuals who were replaced.

4. The University has appealed the Committee's proposed penalties based in part upon the lengthy investigation of this case by the NCAA enforcement staff, as well as the consequences of publicity surrounding the investigation. The Committee does not believe either the length of the

investigation by the NCAA or the publicity related to this case has had any appreciable effect upon the University's athletic program. In this regard, the won/loss records of the University's intercollegiate basketball team for the past five years are: 1972-73, 14-14; 1973-74, 20-6; 1974-75, 24-5; 1975-76, 29-2, and 1976-77, 29-3; further, the University has participated in the National Collegiate Basketball Championships during the 1974-75, 1975-76 and 1976-77 academic years and finished as the third-place team in the 1976-77 National Collegiate Basketball Championship; further, the University has reported that based in part on the success of its intercollegiate basketball team during this period, financial contributions by supporters of the University have substantially increased.

5. The University has appealed the Committee's proposed penalties in this case based in part upon the time differential between the dates the violations occurred as found by the Committee and the date the proposed penalties would be imposed. In this regard, it should be noted that the violations of NCAA legislation found by the Committee in this case occurred during a period beginning in April 1971 and ending with the conclusion of the 1974-75 academic year. Among the reasons for the resultant time differential are: (a) the NCAA's investigation of this case was not sufficiently complete to draft an initial official inquiry to be submitted to the University until January 1976; (b) subsequent to receipt of the official inquiry in February 1976 and a supplement in June 1976, the University found it necessary to request two delays in forwarding its response to the Committee in order to complete its review of each allegation, and the University's response was not received until October 29, 1976; (c) although the University initially appeared before the Committee on November 14, 1976, due to the length of time expended in discussing the various allegations, the Committee and the University found it necessary to meet again on December 13 and 14, 1976, as well as on March 13, 1977, in order to conclude the Committee's hearing of this case, and (d) subsequent to receipt of the Committee's April 26, 1977, confidential report, the University initiated this appeal resulting in the NCAA Council's consideration of this case on August 22, 1977. Obviously, the period of time necessary for the University to conduct its review of these allegations, appear before the Committee on Infractions, and utilize its appeal opportunity before the Council has contributed significantly to the time differential between the violations in this case and penalty imposed.

In regard to Item (a) above, although the NCAA's investigation extended through January 1976, it should be noted that this investigation not only involved information which was included in official inquiries to the University (related to alleged violations occurring throughout the identified period, including the 1974-75 academic year), but also involved information which did not result in the submission of allegations to the Uni-

versity. Subsequent to the completion of this investigation, a period exceeding one and one-half years (January 1976 - August 1977) has elapsed while the University reviewed the allegations, prepared its response to the official inquiry, and appeared in hearings before the Committee and the Council. Although the Committee is concerned with the length of time necessary to process major infractions cases, it believes that the procedures adopted by the NCAA membership and implemented by the Council and Committee on Infractions are necessary to insure that the interests of the NCAA membership, the involved institution and all involved individuals are adequately protected. Further, in the Committee's judgment the time expended to protect these interests in this case should not be considered by the Council as a basis for reducing the proposed penalties.

6. The University has appealed the Committee's findings in part on the basis of the effect they will have upon students and University personnel unassociated with the infractions. Based upon the violations of the Association's governing legislation which have been found by the Committee in this case, it is apparent to the Committee that certain members of the University's basketball coaching staff, as well as certain representatives of the University's athletic interests, violated NCAA legislation in a manner which reflects a lack of proper institutional control. As the Council is aware, the NCAA is an association of member institutions, and it is a fundamental principle of this Association that the control and

responsibility for the conduct of intercollegiate athletics must be exercised by the institution itself. Further, under the provisions of Section 7-(a) of the Official Procedure Governing the NCAA Enforcement Program, "the NCAA penalty should be broad and severe if the violation or violations reflect a general disregard for the governing rules." The Committee believes the penalties proposed in this case as set forth in Parts II-A through E of this report are consistent with this directive and are designed to insure that the University assumes appropriate institutional responsibility for the conduct of its intercollegiate athletic program.

In addition, noting the Council's position that the penalties in infractions cases should also relate directly to the individuals involved in the violations, the Committee has voted to impose a show cause requirement (as set forth in Part II-F of this report) in accordance with the provisions of Section 7-(a)-(12)-(i) of the Official Procedure Governing the NCAA Enforcement Program. This requirement relates to the University's former head basketball coach, a former assistant basketball coach, the present head basketball coach and various representatives of the University's athletic interests. Considering the nature of the violations in which these individuals are involved (as set forth in Part I of this report), the Committee believes that it is apparent the show cause requirement in each case is fully justified. Accordingly, it is the Committee's position that the sanctions proposed in this case are

appropriate and consistent with the principles and purposes of the Association's enforcement program.

7. The Committee believes this to be a most serious case. In determining a penalty, the Committee has attempted to review the various violations in comparison with those found in other infractions cases considered by the Committee and the Council. While recognizing that no two cases are exactly alike, the Committee concluded after extensive consideration that the proposed penalties in this case are in keeping with the penalties imposed by the Committee and Council in previous infractions cases.

III. Origin of case.

Under date of June 21, 1971, a letter was received by the NCAA executive office alleging the improper recruitment of prospective student-athlete Dan Cunningham (Salinas, California) by representatives of the University of Nevada, Las Vegas. Subsequent to receipt of this information, additional information was received by the NCAA alleging the improper recruitment and improper certification of eligibility of other prospective student-athletes.

Under date of November 28, 1972, the Committee on Infractions submitted a notice of preliminary inquiry to the chief executive officer of the University of Nevada, Las Vegas. During inquiries into these initial allegations, the NCAA continued to receive information alleging additional allegations of the Association's legislation on the part of the University and therefore, proceeded to investigate these charges.

Under date of February 25, 1976, the Committee on Infractions submitted an official inquiry to the chief executive officer of the University of Nevada, Las Vegas, and under date of June 21, 1976, the Committee filed a supplemental official inquiry with the University's chief executive officer.

The University's initial response to the Committee's official inquiry and supplement was received on October 29, 1976. The University submitted an additional response to certain allegations on December 3, 1976, and submitted additional materials for the Committee's consideration on November 14, 1976, and March 4, 1977. The University's representatives appeared before the Committee on November 14 and December 13-14, 1976, and March 13, 1977.

Upon consideration of the Committee on Infractions' Confidential Report No. 123 (47) dated April 26, 1977, the University initiated an appeal to the Council in accordance with Section 5 of the Official Procedure Governing the NCAA Enforcement Program.

IV. Related factors appropriate for consideration in judgment of case.

A. The Council should note that the University's hearing before the Committee on Infractions in this case was conducted over a four-day period (November 14 and December 13-14, 1976, and March 13, 1977), resulting in more than 26 hours of discussion of the allegations in this case. Further, the Committee members spent a considerable number of additional hours both individually and collectively in reviewing written information submitted by the University, and in consid-

ering all information presented in order to determine its findings and the proposed penalties in this case. In this regard, the Committee considered more than 70 separate allegations in this case and eventually made 38 separate findings of violations or questionable practices.

B. The Committee believes it appropriate to note that the University did not develop any information during the course of its investigation of this case resulting in the self-disclosure of any violation of NCAA legislation to the Committee. Accordingly, all of the findings in this case resulted from allegations developed through investigation by the NCAA.

C. The Committee notes that in developing its position concerning the validity of the numerous allegations in this case, the University has relied primarily upon information reported or secured by individuals associated with the athletic interests of the University (e.g., University coaches, enrolled student-athletes, representatives of the University's athletic interests and close associates of these coaches or representatives). The information provided by these individuals to the University is often in direct conflict with information reported to the NCAA investigative staff; further, in some instances the conflicting information is provided by the same individuals (e.g., John Bayer, Rudy Jackson, Robert Kelley, Harvey Munford, Eddie Owens, Rodney Parker and Ricky Sobers).

In weighing the information reported by all sources in an attempt to determine the facts,

the Committee noted that the information initially provided the NCAA by those individuals who have reported conflicting information in this case included specific details associated with the violations; further, that these individuals had no reason to provide detailed false information during their initial interviews with the NCAA; finally, that information provided the University by these individuals in subsequent interviews reflected changes which served the athletic interests of the institution. In this regard, it has been the Committee's experience that oftentimes individuals closely associated with the personnel or athletic interests of the institution under inquiry, as well as individuals employed by the institution, are motivated to provide information which would protect the the institution's athletic interests. Further, those individuals directly involved in alleged violations oftentimes are motivated to provide information which would protect their own personal interests.

The Committee believes the Council should also note that the University utilized the services of certain principals identified in alleged violations to contact other individuals cited in various allegations in order to make arrangements for these individuals to provide statements ultimately utilized to develop the University's position as set forth in its response to the official inquiry. In addition, the University relied in part upon statements developed by a principal in this case to make various charges against members of

the NCAA investigative staff. Finally, certain individuals reporting information in support of the University's athletic interests in this case were provided commercial airline transportation at no cost to them to travel from out-of-state locations in order to be interviewed in Las Vegas, a location the University described to the Committee as a "neutral site." The Committee notes that it would appear difficult for the University to weigh the objectivity of information obtained as a result of these procedures.

D. In the Committee on Infractions' view, the involvement of head basketball coach Jerry Tarkanian in the finding set forth in Part I-F-1 of this report constitutes a most serious violation of NCAA regulations in that it represents a disregard for the fundamental cooperative principle of the NCAA enforcement program and is contrary to the basic principles of ethical conduct. Further, the Committee believes the findings set forth in Parts I-G-1 and I-H-7 of this report are most serious inasmuch as these violations, which involve the University's former head basketball coach, John Bayer (I-G-1), and the University's present head basketball coach, Jerry Tarkanian (I-H-7), relate to the academic qualifications of student-athletes.

E. The University, in presenting its case to the Committee, has charged that certain members of the NCAA staff did not collect information reported in this case in an objective and impartial manner, and in some instances may have knowingly misrepresented and falsified infor-

mation presented to the Committee for its consideration during the hearings in which the University participated.

The Committee believes it has provided the University every opportunity to present information and evidence to support its contentions. The University submitted materials to the Committee related to these charges at the time of its first hearing on November 14, 1976, and submitted additional related materials to the Committee under dates of December 3, 1976, and March 4, 1977. Further, these charges were reviewed during the University's appearances before the Committee when information related to the allegations in this case was presented by representatives of the University and the NCAA staff for consideration by the Committee.

Thereafter, in light of the seriousness of these charges, the Committee authorized a special hearing on March 13, 1977, for the purpose of permitting the University, its head basketball coach, Jerry Tarkanian, and his personal legal counsel to question enforcement representatives and review specific charges concerning information reported in this case by Robert Kelley and Rodney Parker. Although the Committee was provided written background material concerning the charges in question, neither the principal investigator in this case nor any other NCAA staff member was provided this material prior to or during this hearing.

After careful consideration of all information presented by the University, Jerry Tarkanian,

his personal legal counsel and the NCAA staff in this case, it is the Committee's conclusion that the University's charges in regard to the NCAA enforcement staff, including the principal investigator in this case, are without substance. In this regard, it is the Committee's position that information related to these charges was developed under questionable circumstances, primarily from individuals motivated to provide information to protect the interests of Tarkanian and the University.

Further, it is the Committee's opinion that the NCAA enforcement staff has investigated this case in accordance with the high standards of personal integrity required in the processing of all infractions cases presented to the Committee. Therefore, the Committee is concerned that the attacks against the enforcement staff in this case have been designed in part to direct the Committee's attention away from the facts related to the alleged violations involving the University. The Committee believes the University's reliance upon this type of approach has actually hindered the development of factual information by the University in its review of alleged violations in this case.

In this regard, the Committee does not believe that the University, in all instances, investigated the numerous allegations submitted in this case with a commitment to determine whether each allegation was substantially correct. Rather, it is the Committee's opinion that in considering these allegations, particularly

those related to head basketball coach Jerry Tarkanian, the University chose to direct its efforts toward developing a defense by attacking the credibility of individuals reporting information contrary to its interests and attempting to impugn the integrity and procedures of the NCAA investigative staff, rather than directing a similar effort toward attempting to determine whether the alleged violations had actually occurred.

F. At various times during the processing of this case, the University has challenged and questioned the Association's procedures. The Committee's responses to these challenges and questions, in regard to the procedures, are set forth for the most part in letters to the University's president, its chancellor and its legal counsel (the chief deputy attorney general, Nevada) dated November 28, 1972; March 14, 1974; April 23, 1974; Janu 19, 1976; February 25, 1976; May 21, 1976; June 2, 1976; June 8, 1976; June 21, 1976; June 24, 1976; September 14, 1976; November 5, 1976; December 4, 1976; April 26, 1977; May 27, 1977, and July 29, 1977. It is the Committee's opinion that these letters accurately describe procedures that were followed in this case, and the basis therefore in regard to each procedure challenged or questioned by the University. Rather than summarize the contents of this correspondence, the Committee calls to the Council's attention that this information is a matter of record for the Council's consideration.

G. As the Council is aware, the Official Procedure Governing the NCAA Enforcement Program (as set forth in the NCAA MANUAL) is established by the Council, approved and adopted by the NCAA membership, and implemented by the Committee on Infractions in accordance with the authority vested in the Committee under the Association's Constitution, Bylaws and the Official Procedure itself. During the processing of infractions cases, the Committee acts under this authority to implement the Official Procedure and respond as necessary to questions which arise concerning the guidelines, policies and procedures of the Committee in situations not specifically described under the Official Procedure. Responses to questions concerning the applicable guidelines, policies and procedures to be followed in such situations are provided by the Committee on Infractions to each member institution involved in an infractions case, including the University of Nevada, Las Vegas.

Specifically, the University of Nevada, Las Vegas, has been notified that the general procedures to be followed in an infractions case are contained in the Official Procedure set forth in the NCAA MANUAL, and in each instance in which the University has requested additional information concerning Committee guidelines related to particular situations in this case, the University has been fully informed of applicable operating policies and procedures (reference: Part IV-F of this report). Nonetheless, the University has also requested a statement of all

Committee on Infractions guidelines, policies and procedures (developed in response to specific situations arising in the processing of current and past infractions cases) which were in effect at any time during the processing of this case.

Upon receipt of the University's request for this additional information, the Committee informed the institution that the various decisions made by the Committee in reference to situations involving different infractions cases were recorded in Committee minutes related to those cases and in some instances were included in the confidential records describing the specific details of those cases. Further, the Committee noted that the guidelines, policies and procedures developed in response to situations in past cases were subject to continual review, and any compilation of such information would not affect the University's position in this case inasmuch as the Committee would continue to respond to any questions posed by the University concerning policies and procedures applicable to situations arising in this case. In this regard, the Council's attention is again directed to Part IV-F of this report.

In addition, as the Council is aware, the Committee on Infractions is in the process of compiling previously recorded Committee policies and procedures on file, as well as drafting additional proposed policies and procedures for the review and approval of the Committee and the Council. Subsequent to the review of the

Committee and the Council, this statement will be made available to the NCAA membership in general.

Accordingly, the Committee has informed the University that once the compilation of this material (presently under way at the direction of the Council) is completed and approved by the Committee and the Council, a copy of the compilation will be forwarded to the University of Nevada, Las Vegas. However, the Committee has denied the University's request for an additional statement of the Committee's past policies, inasmuch as it would be necessary for the Committee to edit past Committee minutes, deleting all references to other member institutions and preparing a statement of these decisions in the context of the various circumstances affecting each particular case, a task the Committee believes is unnecessary to undertake merely for the informational purposes of one institution, particularly in light of other factors related to the University's request.

In this regard, the Committee on Infractions asks the Council to note the following significant factors relevant to the University's request for this additional information: (1) this infractions case has been processed in the same manner as any other infractions case, fully in accordance with the Official Procedure Governing the NCAA Enforcement Program and the Committee on Infractions' policies and procedures; (2) in the Committee's opinion, the University has been

fully advised of all applicable policies and procedures throughout the processing of this case; (3) all specific questions and procedural challenges posed by the University in regard to Committee on Infractions policies and procedures have been answered by the Committee, which remains prepared to answer any additional questions, and (4) the Committee on Infractions and the Council are in the process of reviewing a codification of current Committee on Infractions policies and procedures in order to compile a statement which will be made available to the NCAA membership in general.

Finally, it should be noted that the distribution of the Committee's operating policies and procedures to the NCAA membership in general will not eliminate the need for future notification of procedural changes to institutions involved in infractions cases, nor will it eliminate the need for institutions to contact the Committee to request answers to new procedural questions which may arise in a particular infractions case. Obviously, new procedural questions will arise which will require consideration by the Committee on a case-by-case basis. Accordingly, it will be necessary for the Committee to continue to advise involved member institutions of applicable policies and procedures in their particular cases, as the Committee has done throughout the processing of this case involving the University of Nevada, Las Vegas.

V. Disciplinary or corrective actions taken by institution or conference, or any other agency involved in particular incident.

A. The Committee is not aware of any disciplinary action taken in this case by the University or any other agency.

B. The University has reported that prior to June 1973, the University reorganized its department of athletics and replaced its president, director of athletics and basketball coaching staff. In this regard, the Council's attention is directed to Item 3 on page 32 of this report.